United States Court of Appeals

for the Second Circuit

APPENDIX

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United States Court of Appeals

For the Second Circuit.

BERNARD TOBIN, as father and next friend of DONNA ELLEN TOBIN, a minor,
Plaintiff-Appellee-Appellant,

against

LOUIS EMPLOYMENT AGENCY,
Defendant,

BEN J. and JULIUS SLUTSKY, a partnership doing business as NEVELE COUNTRY CLUB,
Defendants-Appellants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

JOINT APPENDIX.

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UNITED STATES COURT OF APPEALS
FILED
APR 15 1974
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-6978—1974

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UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

- -X

BERNARD TOBIN, as father and next friend of
Donna Ellen Tobin, a minor,

Plaintiff-Appellee-Appellant,

against

LOUIS EMPLOYMENT AGENCY,

Defendant,

BEN J. and JULIUS SLUTSKY, a partnership doing
business as Nevele Country Club,

Defendants-Appellants-Appellees.

On Appeal From the United States District Court for
the Southern District of New York.

- -X

DOCKET ENTRIES.

Date	Proceedings
7- 8-71	Filed complaint and issued summons.
8-19-71	Filed ANSWER of deft. Louis Employment Agency to complaint, and cross-claim.
8-20-71	Filed consent to the amendment of the complaint.
8-20-71	Filed AMENDED COMPLAINT, and issued summons.
9-14-71	Filed ANSWER of deft. Louis Employment Agency to amended complaint and cross-claim.

DOCKET ENTRIES

9-16-71	Filed deft. Louis Employment Agency, interrogs.
9-16-71	Filed answer to interrogs. propounded by deft. Louis Employment Agency.
9-24-71	Filed ANSWER with Cross-Complaint of deft. Nevele Country Club, to amended complaint.
10- 5-71	Filed Affidavit of Service of Answer to amended complaint and cross claim.
10- 5-71	Filed Affidavit of Service of Answer and Cross Claim.
10- 7-71	Filed deft. Louis Employment Agency ANSWER to cross claim of co-deft. Nevelle Country Club.
10- 7-71	Filed Summons with Marshal's ret. Served Nevele Hotel, Inc., by Sanford Cole, on 7-19-71. Louis Employment Agency, by Jack Miller, on 7-22-71.
10-26-71	Filed Answer of deft. Nevele Country Club to cross-complaint in answer.
10-21-71	Filed Summons with Marshal's ret. Served; Ben J. and Julius Slutsky, by J. Roth on 9-8-71.
11-15-71	Filed pltff's Answer to Interrogs.
11-15-71	Filed deft. Louis Employment Agency, Interrogs. to be answered by pltff.

DOCKET ENTRIES

1-27-72	Filed Interrogatories to deft. Nevele Hotel, Inc.
1-27-72	Filed Interrogatories to deft. Louis Employment Agency.
4- 6-72	Filed answers to interrogatories.
6-14-72	Filed deft. Nevele Hotel, Inc. answers to interrogs.
8-29-72	Filed pltffs' Request For Production.
10-18-72	Filed deft. Louis Employment Agency, Response to Request For Production.
9-11-73	Filed Stip & Order that A. Allen Stanger, Esq. of 10 Columbus Circle, New York, N.Y. 10019 is substituted in the place and stead of Wolfman and Stanger as attorney for deft. Louis Employment Agency. So ordered Frankel, J.
10- 4-73	Filed pre-trial order. FRANKEL, J. (Filed in chambers 6-6-73)
10- 4-73	Filed pltff's pre-trial memorandum (Filed in chambers 5-22-73)
11-28-73	Reassigned to Judge Levet.
11-30-73	PRE-TRIAL CONFERENCE HELD - Jury trial, split trial Liability first 2 days.

DOCKET ENTRIES

12- 3-73	Filed deft's (Louis Employment Agency) notice of designation of atty.
12- 3-73	Filed pltff's designation of trial counsel.
12- 3-73	Filed attys notice of appearance for pltff.
12- 3-73	Filed pltff's supplemental pretrial memorandum.
12- 8-73	Filed JUDGMENT #73,990; Ordered that pltff. have judgment against the deft's in the amount of $30,000.00. Judg. Ent. Clerk. Mail notice. Ent. 12-20-73
12-12-73	Before Levet, J. Jury trial begun.
12-13-73	Trial continues & Concluded. Verdict for pltff $30,000.00 Deft. request a 30 days stay of execution of verdict pending appeal. with consent of all parties. Request is granted providing deft's post bond.
1-11-74	Filed deft's (Nevele Country Club) notice of appeal from the final judgment entered. 12-18-73. Mailed copies to Williams, Connolly & Califano & A. Allen Stanger.
1-17-74	Filed deft's memorandum of law.
1-17-74	Filed deft's atty's notice of trial counsel.
1-17-74	Filed deft's request to Charge.

DOCKET ENTRIES

1-17-74 Filed stip & order between deft. Nevele Country Club & Louis Employment Agency discontinuing & dismissing cross-claim against Louis Employment Agency. So ordered. Levet, J.

1-17-74 Filed Bill of costs on Judgment #73,990 in the sum of $335.76. Appearance in opposition noted. Clerk.

1-28-74 Filed pltff's notice of APPEAL to the USCA from judgment entered December 13, 1973 by Levet, J. Mailed copy to Tropp, Goldfinger & Berson.

2- 4-74 Filed deft. Louis Employment Agency's answers to interrog.

SUMMONS.

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

- -X

BERNARD TOBIN, individually and as father and next friend of Donna Ellen Tobin, a minor, 3600 Shannon Road, Cleveland Heights, Ohio 41118,

Plaintiff,

v.

NEVELE HOTEL, Inc., 27 West 72nd Street, New York, New York, LOUIS EMPLOYMENT AGENCY, 96 Third Avenue, New York, New York 10003, BEN J. and JULIUS SLUTSKY, a partnership doing business as Nevele Country Club, 27 West 72nd Street, New York, New York,

Defendants.

- -X

To the above named Defendants:

You are hereby summoned and required to serve upon WILLIAMS, CONNOLLY & CALIFANO, plaintiff's attorneys, whose address 136 East 55th Street, New York, New York

SUMMONS

10022 an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

JOHN LIVINGSTON
Clerk of Court

I. MELIZ
Deputy Clerk

Date: Aug. 20, 1971

(Seal of Court)

AMENDED COMPLAINT.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

1. Jurisdiction is vested in this court pursuant to 28 U.S.C. §1332 in that the matter in controversy is between citizens of different states and that the amount in controversy exceeds the sum of $10,000 exclusive of interest and costs.

2. Plaintiff Bernard Tobin is an adult citizen and resident of the State of Ohio residing at 3600 Shannon Road, Cleveland Heights, Ohio 44118. Donna Ellen Tobin is a minor and resident of the State of Ohio, residing at 3600 Shannon Road, Cleveland Heigh[illegible], Ohio 44118 and is the daughter of plaintiff Bernard Tobin.

3. Defendant Nevele Hotel, Inc. ("Nevele") is a New York corporation licensed to do business in the Southern District of New York and which does business in said district at 27 West 72nd Street, New York, New York.

4. Defendant Louis Employment Agency ("Louis") is licensed to do business in the Southern District of New York and does business in said district at 96 Third Avenue, New York, New York 10003.

5. Defendant Ben J. and Julius Slutsky, a partnership doing business as Nevele Country Club ("Country

Club") is a partnership licensed to do business in the Southern District of New York and does business in said district at 27 West 72nd Street, New York, New York.

6. At all times hereinafter referred to, plaintiff Bernard Tobin, his wife, and daughter Donna Ellen Tobin were paying guests of defendants Nevele and Country Club at their hotel in Ellenville, New York 12428.

FIRST CAUSE OF ACTION

7. Plaintiff realleges and incorporates herein by reference paragraphs 1 through 6 of this Complaint and further alleges as follows.

8. On or about July 11, 1970, Donna Ellen Tobin entered the elevator on the ground floor of the Golden Gate Building of the Nevele Hotel, Ellenville, New York 12428 ("Hotel") to go to the room in which she was staying.

9. At that time Robert Stevens, an agent, servant and/or employee of defendants Nevele and Country Club, assaulted Donna Ellen Tobin without permission or privilege and placed her in immediate fear of further harmful or offensive conduct by brandishing before her a knife and telling her that if she screamed he would slash her throat.

AMENDED COMPLAINT

10. Robert Stevens ("Stevens") then forced Donna Ellen Tobin to proceed in the elevator with him to the top floor of the Hotel. He then forced her to walk down a hallway and onto a catwalk which ran across the roof of the Hotel.

11. Stevens then exposed his genitalia to Donna Ellen Tobin and further assaulted and battered her by placing his hand on various parts of her body.

12. Donna Ellen Tobin asked Stevens to cease his activity. He replied that if she did not allow him to continue this assault and battery he would slit her throat. Only when Donna Ellen Tobin promised not to tell anyone about the unlawful assault and battery by Stevens did he consent to stop.

13. The actions heretofore alleged were done by Stevens maliciously, willfully and intentionally.

14. As a result of the actions heretofore alleged, Donna Ellen Tobin was greatly humiliated and was subjected to great mental and bodily distress all to her damage in the amount of $150,000.

WHEREFORE, plaintiff prays that he have judgment as father and next friend of Donna Ellen Tobin against the defendants Nevele and Country Club and each of them

for compensatory damages in the sum of $150,000 and that he have judgment against the defendants Nevele and Country Club and each of them for punitive damages in the sum of $1 million and that he recover from the defendants Nevele and Country Club his costs of this action.

SECOND CAUSE OF ACTION

15. Plaintiff realleges and incorporates herein by reference paragraphs 1 through 14 of this Complaint and further alleges as follows.

16. The actions hereinabove alleged were done by Stevens, the agent, servant and/or employee of defendants Nevele and Country Club, maliciously, willfully and intentionally.

17. By the actions heretofore alleged, the agent, servant and/or employees of defendants Nevele and Country Club made to Donna Ellen Tobin, both directly and indirectly, threats of physical violence which inflicted upon Donna Ellen Tobin great mental and bodily distress and emotional disturbances all to her damage in the sum of $150,000.

WHEREFORE, plaintiff prays that he have judgment as father and next friend of Donna Ellen Tobin against the

defendants Nevele and Country Club and each of them for compensatory damages in the sum of $150,000 and for punitive damages in the sum of $1 million and that he recover from the defendants Nevele and Country Club his costs of this action.

THIRD CAUSE OF ACTION

18. Plaintiff realleges and incorporates herein by reference paragraphs 1 through 17 of this Complaint and further alleges as follows.

19. The defendants Nevele and Country Club, because plaintiff, his wife and daughter were paying guests of the Hotel owned and operated by defendants Nevele and Country Club, had a contractual obligation to provide them decent and respectful treatment.

20. Because of the aforementioned actions, defendants Nevele and Country Club breached their contractual obligation to the plaintiff and to Donna Ellen Tobin.

21. As a direct result of the actions of the agent, servant and/or employee of defendants Nevele and Country Club and as a direct result of the breach of contractual obligation owed to the plaintiff and to Donna Ellen Tobin by defendants Nevele and Country Club, the plaintiff

individually has suffered physical and mental distress as well as expenses all to his damage in the sum of $10,000.

22. As a direct result of the actions of the agent, servant and/or employee of defendants Nevela and Country Club, and as a direct result of the breach of contractual obligation owed to the plaintiff and to Donna Ellen Tobin by defendants Nevele and Country Club, Donna Ellen Tobin has suffered physical and mental distress as well as expenses all to her damage in the sum of $150,000.

WHEREFORE, plaintiff prays that he have judgment individually against the defendants Nevele and Country Club and each of them for compensatory damages in the sum of $10,000 and as the father and next friend of Donna Ellen Tobin in the sum of $150,000 and that he recover from the defendants Nevele and Country Club his costs of this action.

FOURTH CAUSE OF ACTION

23. Plaintiff realleges and incorporates herein by reference paragraphs 1 through 22 of this Complaint and further alleges as follows.

AMENDED COMPLAINT

24. Defendants Nevele and Country Club negligently maintained hiring practices and operations which allowed Robert Stevens, a recent escapee from a mental institution, to be employed at their Hotel.

25. The conduct of defendants Nevele and Country Club as hereinabove set forth was gross and wanton.

26. As a direct result of the negligent hiring of Stevens by defendants Nevele and Country Club, Donna Ellen Tobin suffered great humiliation, mental and bodily distress all to her damage in the sum of $150,000.

WHEREFORE, plaintiff prays that he have judgment as father and next friend of Donna Ellen Tobin against the defendants Nevele and Country Club and each of them for compensatory damages in the sum of $150,000 and that he have judgment against the defendants Nevele and Country Club for punitive damages in the sum of $1 million and that he recover from the defendants Nevele and Country Club his costs of this action.

FIFTH CAUSE OF ACTION

27. Plaintiff realleges and incorporates herein by reference paragraphs 1 through 26 of this Complaint and further alleges as follows.

AMENDED COMPLAINT

28. Defendants Nevele and Country Club negligently maintained supervision over their agent, servant and/or employee Stevens.

29. The conduct of defendants Nevele and Country Club as hereinabove set forth was gross and wanton.

30. As a direct result of the negligent supervision of Stevens by defendants Nevele and Country Club, Donna Ellen Tobin suffered great humiliation, mental and bodily distress all to her damage in the sum of $150,000.

WHEREFORE, plaintiff prays that he have judgment as father and next friend of Donna Ellen Tobin against the defendants Nevele and Country Club and each of them for compensatory damages in the sum of $150,000 and that he have judgment against the defendants Nevele and Country Club and each of them for punitive damages in the sum of $1 million and that he recover from the defendants Nevele and Country Club his costs of this action.

SIXTH CAUSE OF ACTION

31. Plaintiff realleges and incorporates herein by reference paragraphs 1 through 30 of this Complaint and further alleges as follows.

32. As a direct result of the negligence of defendants Nevele and Country Club as heretofore alleged, plaintiff Tobin has incurred and in the future will continue to incur expenses for the care and treatment of his daughter Donna Ellen Tobin, all to his damage in the sum of $15,000.

WHEREFORE, plaintiff prays that he have judgment individually against the defendants Nevele and Country Club and each of them for compensatory damages in the sum of $15,000 and that he recover from the defendants Nevele and Country Club his costs of this action.

SEVENTH CAUSE OF ACTION

33. Plaintiff realleges and incorporates herein by reference paragraphs 1 through 32 of this Complaint and further alleges as follows.

34. Defendant Louis, in the operation of its employment agency, was negligent in recommending to defendants Nevele and Country Club that defendants Nevele and Country Club procure the employment of Stevens.

35. The conduct of defendant Louis as hereinabove set forth was gross and wanton.

AMENDED COMPLAINT

36. As a direct result of the conduct of defendant Louis, Donna Ellen Tobin suffered great humiliation, mental and bodily distress all to her damage in the sum of $150,000.

WHEREFORE, plaintiff prays that he have judgment as father and next friend of Donna Ellen Tobin against the defendant Louis for compensatory damages in the sum of $150,000 and that he have judgment against the defendant Louis for punitive damages in the sum of $1 million and that he recover from the defendant Louis his costs of this action.

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By THOMAS E. PATTON
A member of the Firm
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(212) 688-9224

WILLIAMS, CONNOLLY & CALIFANO
By PAUL MARTIN WOLFF
By THOMAS E. PATTON
1000 Hill Building
Washington, D. C. 20006
(202) 638-6565
Counsel for Plaintiff

JURY DEMAND

Plaintiff requests a trial by jury on all issues herein.

THOMAS E. PATTON

ANSWER OF DEFENDANT NEVELE COUNTRY CLUB WITH CROSS-COMPLAINT.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Defendant NEVELE COUNTRY CLUB, by TROPP, GOLDFINGER & BERSON, its attorneys, answering the amended complaint of the plaintiff, respectfully alleges:

1. It denies that it has any knowledge or information sufficient to form a belief thereof as to each and every allegation in paragraphs marked "1", "2", "3", "4", "8", "34", "35" and "36" of the amended complaint.

2. It denies that it has any knowledge or information sufficient to form a belief thereof as to each and every allegation in paragraph marked "6" of the amended complaint, except admits, upon information and belief, at the times mentioned plaintiff BERNARD TOBIN, his wife, and daughter, DONNA ELLEN TOBIN, were guests at the Nevele Country Club in Ellenville, New York.

3. It denies each and every allegation in paragraphs marked "9", "10", "11", "12", "13", "14", "16", "17", "20", "21", "22", "24", "25", "26", "28", "29", "30" and "32" of the amended complaint insofar as the same refer to or may in anywise affect this answering defendant.

ANSWER OF DEFENDANT NEVELE COUNTRY CLUB WITH CROSS-COMPLAINT

4. It denies that it has any knowledge or information sufficient to form a belief thereof as to each and every allegation in paragraph marked "19" of the amended complaint, except begs leave to reserve all questions of law for the Court.

AS AND FOR A CAUSE OF ACTION AND CROSS-COMPLAINT AGAINST THE DEFENDANT LOUIS EMPLOYMENT AGENCY, INC., SUED HEREIN AS LOUIS EMPLOYMENT AGENCY, THIS ANSWERING DEFENDANT, NEVELE COUNTRY CLUB, RESPECTFULLY ALLEGES:

5. At the times mentioned in plaintiff's amended complaint and prior thereto, this answering defendant, NEVELE COUNTRY CLUB, a partnership, was the owner of resort premises known as Nevele Country Club in Ellenville, New York.

6. Upon information and belief, at the times mentioned in plaintiff's amended complaint and prior thereto, defendant LOUIS EMPLOYMENT AGENCY, INC., sued herein as LOUIS EMPLOYMENT AGENCY, a New York corporation, operated an employment agency in the City of New York which provided personnel to this answering defendant, NEVELE COUNTRY CLUB, to be hired as employees at its resort premises.

ANSWER OF DEFENDANT NEVELE COUNTRY CLUB WITH CROSS-COMPLAINT

7. Upon information and belief, prior to the times mentioned in plaintiff's amended complaint, defendant LOUIS EMPLOYMENT AGENCY, INC. provided an employee named Robert Stevens to this answering defendant, NEVELE COUNTRY CLUB, with knowledge that he might be hired as an employee to perform his duties in and about the aforesaid resort premises.

8. Upon information and belief, if plaintiffs were caused to sustain injuries and damages at the time and place set forth in plaintiffs' amended complaint and in the manner and due to the facts, circumstances, conditions and negligence alleged therein, through any negligence or carelessness other than their own, such injuries and damages were sustained solely by reason of the active and primary negligence and carelessness, both of omission and commission, on the part of the defendant LOUIS EMPLOYMENT AGENCY, INC., its agents, servants, and/or employees, in negligently causing and creating the conditions complained of; in negligently recommending and providing an employee to this answering defendant, NEVELE COUNTRY CLUB, to be hired and who was hired and who allegedly committed the acts complained of by plaintiffs; in negligently

furnishing and supplying an employee to be hired by this answering defendant, NEVELE COUNTRY CLUB, and who was hired who was not fit, suitable, proper and competent to be an employee at a resort hotel premises; in negligently furnishing and supplying an employee to be hired and who was hired by this answering defendant, NEVELE COUNTRY CLUB, who acted wrongfully, illegally and beyond the scope of his authority; in negligently and carelessly failing to check and investigate the background of the aforesaid employee and reveal same to this answering defendant, NEVELE COUNTRY CLUB; in negligently and carelessly failing to ascertain the background of said employee and advise this answering defendant, NEVELE COUNTRY CLUB, thereof; in negligently recommending, referring and providing an employee to this answering defendant, NEVELE COUNTRY CLUB, to be hired with knowledge that he was to be employed in and about resort premises to which the public was invited; in failing to take precautions to avoid the occurrence complained of by plaintiffs, and without any contributory negligence whatsoever on the part of this answering defendant, NEVELE COUNTRY CLUB.

ANSWER OF DEFENDANT NEVELE COUNTRY CLUB WITH CROSS-COMPLAINT

9. By reason of this suit and action and of the foregoing, this answering defendant will be put to cost and expense, no part of which has been paid by defendant LOUIS EMPLOYMENT AGENCY, INC., who will be wholly liable over to and will be bound to indemnify this answering defendant for the amount of any judgment or verdict that may be recovered herein by plaintiffs against this answering defendant.

WHEREFORE, defendant NEVELE COUNTRY CLUB demands judgment dismissing the amended complaint of the plaintiffs herein, together with costs and the disbursements of this action, and further demands, pursuant to the Federal Court Rules of Civil Procedure for District Courts that the ultimate rights of this answering defendant, NEVELE COUNTRY CLUB, and the co-defendant in this action, LOUIS EMPLOYMENT AGENCY, INC., as between themselves be determined in this action, and that this answering defendant, NEVELE COUNTRY CLUB, have judgment over and against the defendant LOUIS EMPLOYMENT AGENCY, INC., for the amount of any verdict or judgment that may be

recovered herein by the plaintiffs against this answering defendant, together with costs and the disbursements of this action, and all expenses incurred in the defense thereof.

TROPP, GOLDFINGER & BERSON
By SIDNEY GOLDFINGER
Member of the Firm
Attorneys for Defendant
NEVELE COUNTRY CLUB
Office & P. O. Address
500 Grand Concourse
Borough of Bronx
City of New York

ANSWER OF DEFENDANT LOUIS EMPLOYMENT AGENCY AND CROSS-CLAIM.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

The defendant LOUIS EMPLOYMENT AGENCY by the undersigned attorneys, answering the complaint of the plaintiff herein alleges:

FIRST: Denies any knowledge or information sufficient to form a belief as to any of the allegations contained in the paragraphs of the complaint designated as follows: "1", "2", "5", "7", "8", "9", "10", "11", "12", "15", "18", "19", "20", "21", "23", "24", "27" and "28".

SECOND: Denies, except as heretofore admitted, each and every allegation in the paragraphs of the complaint designated as follows: "6", "14", "17", "22", "26", "30", "32", "33", "34" and "35".

THIRD: Denies each and every allegation in the paragraphs of the complaint designated as follows: "13", "16", "25", "29" and "31".

AS AND FOR A FIRST, SEPARATE AND DISTINCT DEFENSE TO THE ENTIRE ACTION, THE DEFENDANT RESPECTFULLY SHOWS THAT:

FOURTH: If the plaintiff sustained any injuries at the time and place alleged in the complaint then said injuries were caused by reason of the negligence of plaintiff contributing thereto.

ANSWER OF DEFENDANT LOUIS EMPLOYMENT AGENCY AND CROSS-CLAIM

FOR A SECOND SEPARATE AND COMPLETE DEFENSE TO THE ENTIRE COMPLAINT HEREIN AND AS A BASIS FOR AFFIRMATIVE RELIEF AGAINST THE DEFENDANT NEVELE HOTEL, INC., THE DEFENDANT LOUIS EMPLOYMENT AGENCY PURSUANT TO THE DEMANDS THAT THE ULTIMATE RIGHTS OF THE DEFENDANT LOUIS EMPLOYMENT AGENCY BE DETERMINED IN THIS ACTION, AND AS AND FOR A FIRST CROSS-CLAIM AGAINST THE DEFENDANT NEVENE HOTEL, INC., THE DEFENDANT LOUIS EMPLOYMENT AGENCY RESPECTFULLY ALLEGES:

FIFTH: That if the plaintiff were caused to sustain damages at the time and place set forth in the plaintiff's complaint through any carelessness, recklessness, negligence other than the plaintiff's own carelessness, recklessness and negligence, said damages were sustained by reason of the sole active and primary carelessness, recklessness and negligence and/or affirmative acts of omission or commission by the defendant NEVELE HOTEL, INC., its agents, servants and/or employees; and if any judgment is recovered herein by the plaintiff against the defendant LOUIS EMPLOYMENT AGENCY it will be damaged thereby and the defendant NEVELE HOTEL, INC., are or will be primarily liable therefor.

SIXTH: That by reason of the foregoing, the defendant NEVELE HOTEL, INC. will be liable to the defendant LOUIS EMPLOYMENT AGENCY in the event and in the amount

of a recovery herein by the plaintiff and the defendant NEVELE HOTEL, INC. is bound to pay any and all attorneys fees and costs of investigation and disbursements.

WHEREFORE, the defendant LOUIS EMPLOYMENT AGENCY demands a judgment dismissing the complaint herein as to this answering defendant and further demands that the ultimate rights of the defendants LOUIS EMPLOYMENT AGENCY and NEVELE HOTEL, INC. as between themselves be determined in this action, and that the defendant LOUIS EMPLOYMENT AGENCY have judgment over and against the defendant NEVELE HOTEL, INC. for the amount of any verdict of judgment which may be obtained herein by the plaintiff against the defendant LOUIS EMPLOYMENT AGENCY together with the costs and disbursements of the action plus all attorneys fees and all other costs herein.

Dated: New York, New York
August 17, 1971

WOLFMAN and STANGER
Attorneys for Defendant
LOUIS EMPLOYMENT AGENCY
By: LEWIS I. WOLF
Office & P. O. Address
10 Columbus Circle
Borough of Manhattan
City of New York (19)

Tel. No. Pleadings, 957-4022
Tel. No. Pre-Trial Conferences, 957-4015

ANSWER OF DEFENDANT LOUIS EMPLOYMENT AGENCY TO AMENDED COMPLAINT AND CROSS-CLAIM.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

The defendant, LOUIS EMPLOYMENT AGENCY by the undersigned attorneys, answering the amended complaint of the plaintiff herein alleges:

FIRST: Denies any knowledge or information sufficient to form a belief as to any of the allegations contained in the paragraphs of the amended complaint designated as follows: "1", "2", "6", "8", "9", "10", "11", "12", "13", "16", "19", "20", "24", "25", "28" and "29".

SECOND: Denies, except as heretofore admitted, each and every allegation in the paragraphs of the amended complaint designated as follows: "7", "15", "18", "23" and "27".

THIRD: Denies each and every allegation in the paragraphs of the amended complaint designated as follows: "14", "17", "21", "22", "26" and "30".

AS AND FOR A FIRST, SEPARATE AND DISTINCT DEFENSE TO THE ENTIRE ACTION, THE DEFENDANT RESPECTFULLY SHOWS THAT:

FOURTH: If the plaintiff sustained any injuries at the time and place alleged in the complaint then said injuries were caused by reason of the negligence of plaintiff contributing thereto.

ANSWER OF DEFENDANT LOUIS EMPLOYMENT AGENCY TO AMENDED COMPLAINT AND CROSS-CLAIM

FOR A SEPARATE AND COMPLETE DEFENSE TO THE ENTIRE AMENDED COMPLAINT HEREIN AND AS A BASIS FOR AFFIRMATIVE RELIEF AGAINST THE DEFENDANTS NEVELE HOTEL, INC. AND BEN J. AND JULIUS SLUTSKY, THE DEFENDANT LOUIS EMPLOYMENT AGENCY PURSUANT TO THE CPLR DEMANDS THAT THE ULTIMATE RIGHTS OF THE DEFENDANT LOUIS EMPLOYENT AGENCY BE DETERMINED IN THIS ACTION, AND AS AND FOR A CROSS-CLAIM AGAINST THE DEFENDANTS NEVELE HOTEL, INC. AND BEN J. AND JULIUS SLUTSKY, THE DEFENDANT LOUIS EMPLOYMENT AGENCY RESPECTFULLY ALLEGES:

FIFTH: That if the plaintiff were caused to sustain damages at the time and place set forth in the plaintiff's amended complaint through any carelessness, recklessness, negligence other than the plaintiff's own carelessness, recklessness and negligence, said damages were sustained by reason of the sole active and primary carelessness, recklessness and negligence and/or affirmative acts of omission or commission and/or breach of warranty by the defendants NEVELE HOTEL, INC. and BEN J. and JULIUS SLUTSKY its agents, servants and/or employees; and if any judgment is recovered herein by the plaintiff against the defendant LOUIS EMPLOYMENT AGENCY it will be damaged thereby and the defendants NEVELE HOTEL, INC. and BEN J. and JULIUS SLUTSKY, are or will be primarily liable therefor.

SIXTH: That by reason of the foregoing, the defendants NEVELE HOTEL, INC. and BEN J. and JULIUS SLUTSKY will

be liable to the defendant LOUIS EMPLOYMENT AGENCY in the event and in the amount of a recovery herein by the plaintiff and the defendants NEVELE HOTEL, INC. and BEN J. and JULIUS SLUTSKY is bound to pay any and all attorneys fees and costs of investigation and disbursements.

WHEREFORE, the defendant LOUIS EMPLOYMENT AGENCY demands a judgment dismissing the amended complaint herein as to this answering defendant and further demands that the ultimate rights of the defendants LOUIS EMPLOYMENT AGENCY and NEVELE HOTEL, INC. and BEN J. and JULIUS SLUTSKY as between themselves be determined in this action, and that the defendant LOUIS EMPLOYMENT AGENCY have judgment over and against the defendants NEVELE HOTEL, INC. and BEN J. and JULIUS SLUTSKY for the amount of any verdict of judgment which may be obtained herein by the plaintiff against the defendant LOUIS EMPLOYMENT AGENCY together with the costs and disbursements of the action plus all attorneys fees and all other costs herein.

Dated: New York, New York
September 13, 1971

WOLFMAN and STANGER
Attorneys for Defendant
LOUIS EMPLOYMENT AGENCY
By: LEWIS I. WOLF
Office & P. O. Address
10 Columbus Circle
Borough of Manhattan
City of New York (19)

Tel. No. Pleadings, 957-4022
Tel. No. Pre-Trial Conferences, 957-4015

ANSWER OF DEFENDANT NEVELE COUNTRY CLUB TO CROSS-COMPLAINT CONTAINED IN ANSWER OF LOUIS EMPLOYMENT AGENCY TO THE AMENDED COMPLAINT.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Defendant, NEVELE COUNTRY CLUB, sued herein as BEN J. and JULIUS SLUTSKY, by its attorneys, TROPP, GOLDFINGER & BERSON, answering the cross-complaint of the defendant, LOUIS EMPLOYMENT AGENCY, contained in the answer to the amended complaint, respectfully alleges:

1. It denies each and every allegation in paragraph marked "FIFTH" of the cross-complaint.

WHEREFORE, defendant NEVELE COUNTRY CLUB, sued herein as BEN J. and JULIUS SLUTSKY, demands judgment dismissing the cross-complaint of the defendant, LOUIS EMPLOYMENT AGENCY, together with costs and the disbursements of this action.

TROPP, GOLDFINGER & BERSON
By SIDNEY GOLDFINGER
A Member of the Firm
Attorneys for Defendant
NEVELE COUNTRY CLUB, sued herein
as BEN J. and JULIUS SLUTSKY
Office & P. O. Address
500 Grand Concourse
Bronx, New York 10451

ANSWER OF DEFENDANT LOUIS EMPLOYMENT AGENCY TO CROSS-CLAIM OF DEFENDANT NEVELLE COUNTRY CLUB.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

The defendant, LOUIS EMPLOYMENT AGENCY, by the undersigned attorneys, answering co-defendant, NEVELLE COUNTRY CLUB, cross claim herein alleges:

1. Denies each and every allegation in the paragraphs of the co-defendant's cross-claim designated as follows: "SIXTH", and "SEVENTH" except admits at the time mentioned in the cross-claim, defendant, LOUIS EMPLOYMENT AGENCY, INC. a New York corporation, operated an employment agency in the City of New York which sent applicants for employment to this answering defendant, NEVELE COUNTRY CLUB, for possible hiring as employees at its resort premises, and thus sent Robert Stevens to this answering defendant, NEVELLE COUNTRY CLUB.

2. Denies each and every allegation in the paragraphs of the co-defendant's cross-claim designated as follows: "EIGHTH" and "NINTH".

ANSWER OF DEFENDANT LOUIS EMPLOYMENT AGENCY TO CROSS-CLAIM OF DEFENDANT NEVELLE COUNTRY CLUB

WHEREFORE, the aforesaid defendant demands judgment dismissing co-defendant's cross-claim herein, together with costs and disbursements of this action.

Dated: New York, New York
October 6, 1971

Yours, etc.

WOLFMAN and STANGER
By: LEWIS I. WOLF
Office & P. O. Address
10 Columbus Circle
New York, N. Y. 10019

Tel. No. Pleadings, 957-4022
Tel. No. Pre-trial & trial conferences, 957-4015

PRE-TRIAL ORDER.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Basis of Jurisdiction:

Jurisdiction is vested in this court pursuant to 28 U.S.C. §1332 in that the matter in controversy is between citizens of different states and that the amount in controversy exceeds the sum of $10,000 exclusive of interest and costs.

Parties:

Plaintiff Bernard Tobin brings this action individually and as father and next friend of his daughter Donna Ellen Tobin.

Defendants are Nevele Hotel, Inc., Louis Employment Agency, and Ben J. and Julius Slutsky, a partnership doing business as Nevele Country Club (hereinafter referred to as Nevele Country Club).

Plaintiff's Statement of Facts:

Prior to and on the date of July 11, 1970, plaintiff Bernard Tobin, his wife and his fifteen year old daughter Donna Ellen were paying guests at the Nevele Country Club in Ellenville, New York. At approximately 3:15 p.m.

on July 11, 1970, having just returned from horseback riding, Donna Ellen Tobin entered the elevator of the Golden Gate Building of the Nevele Country Club to go to her room to change into her swimming suit. While in the elevator, Robert Stevens, an employee of the Nevele Country Club, brandished before her a knife and told her that if she screamed he would slash her throat. Stevens then forced Donna Ellen to proceed in the elevator with him to the top floor of the Golden Gate Building of the Nevele Country Club. He then forced her to walk down a hallway and onto a catwalk which ran across the roof of the hotel building. Stevens then exposed his genitalia to Donna Ellen Tobin and assaulted and battered her by placing his hands beneath her clothing and onto various parts of her body. Stevens placed his hands upon the breasts and vaginal area of Donna Ellen Tobin. In addition, Stevens held a knife to the body of Donna Ellen Tobin. Donna Ellen Tobin asked Stevens to cease his activity. He replied that if she did not allow him to continue this assault and battery he would slit her throat. Only when Donna Ellen Tobin promised not to tell anyone about the unlawful assault and battery by Stevens did he consent to stop. Donna Ellen Tobin then proceeded back

across the roof to the elevator and down to the main floor of the hotel, in tears and mental anguish.

* * *

Facts Not in Dispute:

1. At the time of the incident involving Donna Ellen Tobin, Robert Stevens was and had been since July 8, 1970 an agent, servant and/or employee of the Nevele Country Club.

2. Mr. Stevens was referred to the Nevele Country Club for employment by defendant Louis Employment Agency.

Plaintiff's Contentions:

Defendant Nevele Country Club is liable to the plaintiff for compensatory damages for:

1. The threats of physical violence and the assault and battery committed upon Donna Ellen Tobin by Robert Stevens while he was an agent, servant and/or employee of Nevele Country Club.

2. The breach by Nevele Country Club of its contractual obligation to provide the plaintiff, his wife and daughter decent and respectful treatment while they were paying guests and business invitees at the Nevele Country Club.

PRE-TRIAL ORDER

3. Nevele Country Club's negligent hiring practices and operations which allowed Robert Stevens to be employed at the Nevele Country Club.

4. Nevele Country Club's negligent supervision of Robert Stevens while he was an agent, servant and/or employee of the Nevele Country Club.

Defendant Louis Employment Agency is liable to the plaintiff for compensatory damages for its negligence in recommending to Nevele Country Club that it procure the employment of Robert Stevens.

All defendants are liable to the plaintiff for punitive damages inasmuch as their conduct was reckless, negligent, gross and wanton.

Contentions of Defendant Nevele Country Club:

The defendant, Nevele Country Club, contends that it was not negligent with respect to the ownership, operation and control of a hotel known as The Nevele Hotel located at Ellenville, New York. Said defendant further contends that Robert Stevens did not act as an agent, servant and/or employee of the defendant, Nevele Country Club and/or The Nevel Hotel when said Robert Stevens allegedly assaulted the infant plaintiff, Donna Ellen Tobin. Said defendant further contends that it did not

breach any contractual obligations owed to the plaintiffs and did not cause and was not responsible for any alleged physical harm and/or mental distress allegedly sustained by the infant plaintiff, Donna Ellen Tobin.

Said defendant further contends that it was not negligent with respect to its hiring practices and/or hiring operations and that said defendant complied with the regularly accepted practices with respect to hiring of personnel in full compliance with any existing laws, rules and regulations of any governmental body, and said Robert Stevens obtained his employment as a result of a referral and recommendation from the co-defendant, Louis Employment Agency, who presumably performed the necessary required screening processes with respect to employees, and it is further contended that the infant plaintiff did not suffer great humiliation and mental and bodily distress as a result of any negligence on the part of the defendant, Nevele Country Club. Said defendant further contends that it was not negligent with respect to the supervision of its employees, agents and/or servants, and that it could not foresee and was not the proximate cause of any injuries, humiliation, mental and/or bodily distress allegedly sustained by the infant plaintiff.

Defendant, Nevele Country Club, used the requisite care in order to protect and safeguard its guests from injuries as a result of causes which could be reasonably anticipated. However, it is the contention of said defendant that it was not obligated to and could not be expected to anticipate the unusual and abnormal.

Contentions of Defendant Louis Employment Agency are Attached hereto Annex

Defendant Louis Employment Agency has submitted no material for inclusion in this category.

Trial:

This is a jury trial. Plaintiff requests a twelve member jury. Plaintiff will accept but defendants do not agree to a jury verdict by five-sixths. * * *

The expected time of trial is two days.

Exhibits to be Offered by Plaintiff:

1. Application submitted on July 7, 1970 by Robert Stevens to Louis Employment Agency, a copy of which was attached to Nevele Country Club's answers to plaintiff's interrogatories.

2. Four photographs of Donna Ellen Tobin at the location on the roof of the Golden Gate Building of the Nevele Country Club where the assault to her took place.

PRE-TRIAL ORDER

Exhibits of defendant Agency are listed in Annex 1 p. 3.

Witnesses:

Plaintiff anticipates calling the following witnesses at trial:

1. Bernard Tobin.
2. Mrs. Bernard Tobin.
3. Donna Ellen Tobin.
4. Ronald L. Lenkin.
5. Defendant Ben J. Slutsky.
6. Defendant Julius Slutsky.

Should any party desire to call additional witnesses, he will immediately notify opposing counsel and this court of his intentions.

Defendant Nevele Country Club anticipates calling the following witnesses at trial:

1. Chuck Mutzer.
2. Marian Slutsky.
3. Irving Siegel.
4. Charles Slutsky.

Witnesses of defendant Louis Employment Agency as listed in Annex 1 p. 3.

PRE-TRIAL ORDER

Damages:

Plaintiff claims no special damages. Plaintiff does claim compensatory damages for mental and bodily distress, humiliation, and emotional disturbance. Plaintiff also seeks punitive damages against all defendants.

Dated:

_____
Judge

CONSENTED TO:

TROPP, GOLDFINGER & BERSON
By Adolph B. Salib Stephen Harris
500 Grand Concourse
Bronx, New York 10451
Attorneys for Defendant
Nevele Country Club

CONSENTED TO:

WILLIAMS, CONNOLLY & CALIFANO
By Thomas E. Patton
136 East 55th Street
New York, New York 10022

WILLIAMS, CONNOLLY & CALIFANO
By Paul Martin Wolff
1000 Hill Building
Washington, D. C. 20006
Attorneys for Plaintiff

JQjw TRANSCRIPT 1

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

BERNARD TOBIN, et ano, :

Plaintiffs

vs. : 71 CIV 3030

NEVELE HOTEL, INC., et al.,

Defendants. :

----------x

December 12, 1973
New York, New York

Before:

HON. RICHARD H. LEVET,

District Judge.

APPEARANCES:

PAUL WOLFF, ESQ.
FREDERICK E. SHERMAN, ESQ.
STUART J. BECK, ESQ.
Attorneys for the Plaintiff

ALPHONSE ECKSTEIN, ESQ.
Attorney for Defendants Nevele Hotel, Inc., Nevele CC, Ben J. and Julius Slutsky

PHILIP ARKOW, ESQ.
Attorney for 3rd-party Defendant, Louis Employment Agency

(In the robing room)

MR. SHERMAN: My name is Frederick Sherman.

THE COURT: Are you a member of this Bar?

MR. SHERMAN: I am, sir.

This is Mr. Wolff from Washington and I move his admission.

THE COURT: Did I pass on this before?

MR. SHERMAN: I don't believe so.

THE COURT: Are you a member of the District Court Bar there?

MR. WOLFF: In the District Court of Appeals of the District of Columbia.

THE COURT: Are you a member of the District of Columbia District Court Bar?

MR. WOLFF: Yes.

THE COURT: Is somebody going to move for admission?

MR. SHERMAN: I would like to move Mr. Wolff's admission.

THE COURT: Have you tried cases down there in the District Court?

MR. WOLFF: Yes.

THE COURT: Many?

MR. WOLFF: Many.

THE COURT: You are admitted ad hoc.

Who is going to try the case for the plaintiff, are you?

MR. WOLFF: Yes, I am, your Honor.

THE COURT: All of you get your pleadings out and in the first place what about the agency? Are you going to move to discontinue as against the agency?

MR. WOLFF: I will make -- except they are removed from the case upon approval from their counsel along the lines that I have been informed.

THE COURT: What do you mean, money?

MR. WOLFF: No, your Honor.

THE COURT: What?

MR. WOLFF: I was informed --

THE COURT: Who represents the agency?

MR. ARKOW: I do.

THE COURT: What do you want to condition this on?

MR. WOLFF: I was told that the man scheduled to try the case for the agency was sick and was unable to try it.

THE COURT: Is that so?

MR. ARKOW: He had a heart condition. He is in the hospital now.

THE COURT: You are so advised and you represent that?

MR. ARKOW: Yes.

MR. WOLFF: On that condition I dismiss the Louis Employment Agency.

THE COURT: Who are you?

MR. ECKSTEIN: My name is Eckstein and I represent Nevele.

THE COURT: Was there a claim over?

MR. ECKSTEIN: Yes.

MR. ARKOW: I think your Honor decided that you would pass on the cross claim without a jury.

THE COURT: I don't know if you were present.

MR. ECKSTEIN: The reason I say this at this time is the probabilities are that some testimony will have to come out at this trial between my defendant and the co-defendant.

THE COURT: Do you think you have a Chinaman's chance against the agency?

MR. ECKSTEIN: I?

THE COURT: Yes.

MR. ECKSTEIN: Yes, Judge.

THE COURT: Why?

MR. ECKSTEIN: Because they are the ones --

THE COURT: Did you file any brief with me on that? Somebody did.

MR. ECKSTEIN: This morning, Judge.

THE COURT: Somebody filed one before.

Have you got any cases here?

MR. ECKSTEIN: Yes, Judge.

THE COURT: Have you got your copy with you?

Where is there anything here about liability against the agency?

MR. ECKSTEIN: May I go out and get my copy?

THE COURT: Yes, you better bring your tools with you, counselor.

Have you studied that problem at all, counselor?

MR. ARKOW: No, I don't think so.

THE COURT: What page do you have this on? There is a pleading of a claim-over, isn't there, counselor?

MR. ECKSTEIN: Yes.

THE COURT: Is there any doubt about that in your mind?

MR. ARKOW: No, Judge.

THE COURT: All right. Where in your brief do you say anything about the claim against the agency?

MR. ECKSTEIN: Page 10, Judge, point 6.

THE COURT: Any cases, counselor?

MR. ECKSTEIN: The cases we cited.

THE COURT: Are they employment cases?

MR. ECKSTEIN: I don't think so, Judge.

THE COURT: What authority do you have?

MR. ECKSTEIN: The question of negligence.

THE COURT: Negligence in what respect?

MR. ECKSTEIN: Improper screening.

THE COURT: Is that asserted in your pleadings?

MR. ECKSTEIN: I don't know.

THE COURT: Maybe it is but you have absolutely no basis or any authority.

MR. ECKSTEIN: Will you bear with me one minute, Judge?

THE COURT: In the meantime, Mr. Wolff, maybe you can answer this question: What is there in the pleadings against these two individuals? The episode was in which place?

MR. WOLFF: The episode was at the Nevele Country Club. The Nevele Country Club is a partnership.

THE COURT: I thought it was in the hotel.

MR. WOLFF: It is a hotel but it is called the Nevele Country Club.

THE COURT: Who owns the country club?

MR. WOLFF: The two named defendants, Mr. Julius

Slutsky and Mr. Ben Slutsky. It's a partnership.

THE COURT: There is no corporate ownership?

MR. WOLFF: No, there is no corporate ownership.

THE COURT: Which pleading is against the owners of the country club, can you tell me which cause of action?

MR. WOLFF: Yes.

THE COURT: Which one?

MR. WOLFF: All except the one against Louis Employment Agency or all against the two Mr. Slutskys doing business as Nevele Country Club.

THE COURT: Where is it asserted that -- well, is it asserted that this partnership owned and operated the country club?

MR. WOLFF: Yes, paragraph 5. It says defendant Ben J. and Julius Slutsky, a partnership doing business as Nevele Country Club is a partnership licensed to do business.

THE COURT: Is it asserted in 3 -- where is it asserted that the country club was the owner -- that these people are the owners of the country club, yes. But is it asserted also that the country club was concerned with this episode?

MR. WOLFF: In paragraph 5 I mention that throughout the complaint --

THE COURT: It is kind of a loose statement. However, are you familiar with the necessity of proof against the owners as to punitive damages? Are you going to present punitive damages, counselor? I thought you would have a very slim chance if any.

Are you familiar with the case, and it seems to be the New York rule, and it is Gill against Montgomery Ward. It is Third Department, Appellate Division, 54. It is in volume 254, page 36 and the rule is set forth on page 40.

Are you familiar with that case?

MR. WOLFF: Not by name, your Honor.

THE COURT: You better look at this. I think you are barking up the wrong tree.

What am I going to do, Mr. Arkow? We have this opposition.

MR. ARKOW: If your Honor will give me an opportunity, I will call his office. I think I can get them to discontinue --

THE COURT: Somebody else in his office?

MR. ARKOW: Yes.

THE COURT: Do you mind, counselor?

MR. ECKSTEIN: No.

THE COURT: You are only concerned with the

Ow 9

phase of that case?

MR. ARKOW: Yes. If not, they can always start an action against us.

THE COURT: They can wait until there is a verdict. You understand that, don't you?

MR. ECKSTEIN: Yes, I do, Judge.

THE COURT: Let him call. He will probably talk with somebody else in your office.

What do you say, Mr. Wolff, about that rule? Is that the rule that governs? New York State law governs, doesn't it?

MR. WOLFF: First let me say, I did not recall the case by name --

THE COURT: Is it correct?

MR. WOLFF: It is correct.

THE COURT: How are you going to prove punitive damages against these two individuals who as a partnership may have owned the country club hotel or whatever it was?

MR. WOLFF: It says punitive damages may be recovered against an employer because of the malicious act of its employee only if it was shown that the malicious act is shown --

THE COURT: Could you show that?

MR. WOLFF: Ratification.

THE COURT: Off the record.

(Discussion off the record)

THE COURT: We have discussed now the generalization of the way in which the Court should speak to the jurors on the voir dire with respect to the nature of the case. It seems to be the consensus that the Court should tell them in essence what is set forth in 9, 10 and 11 of the complaint. Any objections to that?

MR. WOLFF: No, your Honor.

MR. ECKSTEIN: No, Judge.

THE COURT: In any event, gentlemen, if this case is not dismissed as against the employment company it will be tried as indicated by the defense against the employment company to the Court. You agree to that?

MR. ECKSTEIN: Yes.

THE COURT: I will restate it to this gentleman. I think he knows about it.

There will be three challenges on each side here. There won't be any, of course, because the employment agency will not be in the case. There will be two alternates selected and there the premptory challenges will be one on each side.

Off the record.

(Discussion off the record)

MR. WOLFF: The plaintiff moves to discontinue and dismiss the Louis Employment Agency as a defendant in this case.

THE COURT: Is it without cost or with cost?

MR. ARKOW: Without cost.

THE COURT: No opposition, counselor?

MR. ARKOW: No opposition.

THE COURT: Motion granted. Accordingly the clerk is directed to omit the name of the employment agency from the title of the action and particularly if you call the name of the case.

MR. ECKSTEIN: I was going to ask you before you ruled on this motion, Judge --

THE COURT: I have ruled on it already.

MR. ECKSTEIN: I want to inquire as to where I stand now with my defense as to conversations with Louis Employment Agency about getting this fellow Stevens?

THE COURT: I don't know.

MR. ECKSTEIN: That is my defense in this case.

THE COURT: You will have to pose your question and I will have to pass on it. What else can I do? There probably will be some objections.

MR. ECKSTEIN: There will be objections.

THE COURT: It is out as far as the defense is concerned. That does not mean that it is out as far as your claim-over is concerned.

MR. ECKSTEIN: Correct. But I am out as far as the defense.

THE COURT: Counsel for the employment agency, I think I said that the claim-over would be decided on what is produced on the jury trial plus whatever evidence counsel for either plaintiff or employment agency defendant might wish to put in. You have a right to come in here. The dismissal as a party doesn't dismiss it as to your third-party defendants action. Do you get me?

MR. ECKSTEIN: I get you, Judge. But I am looking at testimony in my defense.

THE COURT: This sort of puts a little crimp in things.

Will you stipulate that the claim-over may be decided on the evidence submitted on this record?

MR. ARKOW: Yes.

THE COURT: That means that --

MR. ARKOW: They are willing to discontinue the claim-over.

THE COURT: Where did you get that? Is that so? You didn't say that. I passed on the motion of the

plaintiff to discriminate holding you into the plaintiff.

Do you say that there was a consent to discontinue the claim-over?

MR. ARKOW: That is what I made the call for, your Honor.

MR. ECKSTEIN: Then my man has misunderstood.

THE COURT: Go out and check, for heaven's sake. Let's get this organized, it will save a lot of time.

MR. ECKSTEIN: On the question of the $15,000 the answer is definitely no.

THE COURT: What about the discontinuance?

MR. ECKSTEIN: We have no objection to a discontinuance or dismissal of the plaintiff against him but I will not consent to a dismissal of the crosscomplaint against Louis.

THE COURT: You fellows ought to be able to iron this out.

MR. ARKOW: Discontinued without prejudice.

THE COURT: Why don't you both go to the telephone and call somebody, if there is somebody in the firm who can be the Supreme Court.

Go out and do that to be certain you satisfy yourselves.

(Pause)

MR. WOLFF: Plaintiff moves that the case should be recaptioned so that Bernard Tobin's claim individually be dismissed so that the plaintiff now reads Bernard Tobin as father and next friend of Donna Ellen Tobin, a minor and that Nevele Hotel, Inc. also be dismissed out so that the sole defendant against whom plaintiff has a cause of action is Ben J. and Julius Slutsky, a partnership doing business as Nevele Country Club.

THE COURT: And that the title be amended accordingly.

MR. WOLFF: Yes, your Honor.

MR. ECKSTEIN: If your Honor please, you are now throwing out, by this change, by this granting of a motion you are throwing out my pending cross-complaint.

THE COURT: No, I am not.

MR. ECKSTEIN: The cross-complaint is not in the picture any more.

THE COURT: I will put a little limitation on this.

MR. ECKSTEIN: I appreciate something, Judge, to show that we haven't discontinued against them.

THE COURT: Are you going to stay in court, counselor?

MR. ARKOW: I would rather not, Judge.

THE COURT: You realized that if you stipulate that the cross-claim be decided on the basis of the testimony that comes in here counsel will have a right to try to get something in. I don't know whether there is anything to your cross-claim because I don't think there is much of anything to a claim against the employment agency. I am talking to you. You see, what it means is that you should at least try to protect the employment agency on the main case if Mr. Eckstein is going to work that way.

MR. ARKOW: In view of the fact that your Honor is going to decide these cross-complaints I will sit moot just to see that my client's rights are protected and that is all.

THE COURT: All right. I may give you the right to make objections if you feel so urged.

MR. ECKSTEIN: But under the circumstances, Judge, Louis Employment Agency is not a party defendant as you have the caption of the title.

THE COURT: I just told you I would add to this motion determinations that it does not effect the claim-over.

This change of the title of this action for the

purpose of this trial here today on this jury case nevertheless does not dismiss the claim-over by the above-mentioned defendants against the Louis Employment Agency.

Are you satisfied now?

MR. ECKSTEIN: That is fine, Judge.

THE COURT: Is everybody reasonably satisfied?

Let's go out.

Mr. Wolff, since I think I have in substance elicited this, your claim for damages does not have any special damages. You told me that, is that correct?

MR. WOLFF: That is correct, your Honor.

THE COURT: Can you describe what your claim is for damages?

MR. WOLFF: Yes. The claim for damages is in two parts, your Honor.

THE COURT: Is there any claim for physical injuries?

MR. WOLFF: No.

THE COURT: What else is there?

MR. WOLFF: The mental distress and emotional disturbance suffered by Donna Ellen Tobin when the incident itself took place.

Secondly, it is the effect the incident had on her. She will testify, but more importantly her parents

will testify how this incident has altered her conduct and caused her to develop certain fears and phobias which she maintains to this day.

THE COURT: Where is the causal connection? How is that going to be proved?

MR. WOLFF: I think it is one that a jury can easily draw.

THE COURT: Isn't it something that is a psychiatric factor?

MR. WOLFF: It is not a psychiatric --

THE COURT: All right. If you say that, all right, but there will be objections to it, I am certain.

MR. WOLFF: It is simple things like to this day --

THE COURT: But how can a laymen testify against as to a future situation? You know the rule in physical matters. A layman can't say "Well, I am going to have this for the next forty years."

MR. WOLFF: There will be no testimony of that kind. It will be what has happened since the incident until today. There is no future claim.

THE COURT: I will have to pass on it when it is offered. I can't agree that lay testimony is sufficient on that but maybe it is.

I will pass on it when the testimony is offered

and if there is some question about it I will have to take a proffer of proof and decide whether it is admissible. All right, gentlemen. Let's go on now.

Do you still press punitive?

MR. WOLFF: Yes, your Honor.

THE COURT: I don't think you are going to get to first base on it.

There may be a motion later to strike out any punitive damage claim and no reference must be made, I am going to tell you this now, not refer to punitive damages in your opening.

MR. WOLFF: I will make no reference until your Honor has ruled upon the matter.

THE COURT: I think we have more or less sifted this thing out. All right.

What am I going to do about introducing or not introducing counsel for the employment agency?

MR. WOLFF: I have no opinion. Whatever they decide.

THE COURT: That is merely between you two.

MR. ECKSTEIN: I Would have no objection that his name be silent.

THE COURT: He may question if necessary and if he does question I will have to tell them.

MR. ECKSTEIN: If he does at that point.

MR. ARKOW: May I suggest this: Let me bow out of the picture.

THE COURT: If you bow out you bow out at your peril. Or your client's peril. You better stay in it and then if you want to ask questions you can approach the bench or call it off the record to my attention. I think that is sounder.

But I am not going to introduce you, Mr. Arkow, in the beginning.

Let's proceed.

(In open court)

(A jury of six and two alternates were duly impaneled and sworn)

(In open court, jury present)

THE COURT: A word to the jurors. This is the time for what is called openings. These are statements by the respective lawyers as to what the proof will likely be or what it will not be. Keep in mind, however, that whatever the lawyers say is not evidence. It is merely an outline of the case. The evidence must come from witnesses or documents, exhibits or depositions or statements made before trial under oath.

However, whatever the lawyers may say about the prospective

evidence and whatever they say is, of course, their statement about the prospective evidence, will be of some assistance, considerable assistance perhaps, to the jurors and to the Court in connection with the understanding of the case.

At this time the plaintiffs' lawyer speaks first. Consequently, Mr. Wolff, you may proceed.

MR. WOLFF: Thank you, your Honor.

First, ladies and gentlemen of the jury, let me introduce you to Mr. Tobin. This is Bernard Tobin.

THE COURT: He has been presented before.

MR. WOLFF: In the back is Donna Tobin, his daughter.

THE COURT: They will be introduced when you call them, counsel. This must be a Washington procedure. I never noticed that it's been done here. I don't know there is anything wrong about it but I don't think it is necessary.

MR. WOLFF: I want to take a few minutes of your time to briefly outline to you the case that the plaintiff will put on. I think it can best be summed up in one sentence. We will present a case that started out as a vacation of fun and mirth and ended in an incident of horror.

The Tobins started out in their home in the Cleveland area to go to the Nevele Country Club. It is a hotel resort in the Catskill Mountains for a vacation. They knew where to go and they reached a decision that that seemed to be a good place. They read the ads and brochures that the Nevele distributed through travel agencies and they realized that it was a place where adults could go and enjoy themselves and they could also take teenage children there who would be carefully supervised in an organized program. The parents could do things they would enjoy and the children may not but the children would be with people their own age in a course of activity which would allow the parents not to worry. The parents could be pleased to know that their children would be carefully watched over.

This case comes down to the fact that that did not happen. It just didn't happen. On July 11, 1970 Donna Ellen Tobin experienced an incident, as I said, of horror. I can stand here and tell you what the testimony will be but I don't want to color it in any fashion. It is not a pleasant matter. It is not a matter easily brought here but it is a matter that has to be brought here and has been brought here because a wrong has been committed and that wrong must be righted

and you are the only six people that can do it. So I will allow Donna Tobin to tell you about that incident. She will tell you what happened, what took place on July 11, 1970. I will ask her parents to tell you about the effect this has had on her, how they have noticed their daughter's behavior change. They will tell you why they went to the Nevele and what they expected.

MR. ECKSTEIN: I object. I don't think this is proper opening.

THE COURT: Mr. Reporter, will you read the last sentence of plaintiffs' counsel.

(Statement read)

THE COURT: What is the part to which you object specifically?

MR. ECKSTEIN: The part of the behavior, unless he is going to produce some other witness.

THE COURT: Well, the jury may disregard that part. Proceed, counselor. You will have to be a little more circumspect, I think.

MR. WOLFF: The parents will tell you how the Nevele responded after the incident. They will tell you about conversations with key Nevele personnel, people that put themselves forward as being the people that ran the place and you will hear statements from the Tobins

that were made to them by the Nevele, statements --

THE COURT: I don't know about the admissibility of that, counselor. I don't know what it is and I am not going to pass on it now. I think you are going a little too far, if I may say so for an opening statement.

MR. WOLFF: It is best for me to tell you that I will call Mr. Tobin, Mrs. Tobin and Donna Tobin and I will let them tell you what happened and then you cannot say that I have in any way colored the story or biased your view because it is through them that you must hear the case and it is through them that you must decide the case and so I will leave it up to them and up to you.

THE COURT: Mr. Eckstein for the defendant.

MR. ECKSTEIN: If it pleases the Court, Mr. Wolff, gentlemen, madam, members of the jury.

I represent two gentlemen who operate the Nevele Country Club up in the Catskill Mountains.

Under our system of law the Court will tell you that I can sit back the same as you and listen to the evidence as it comes from the witness and the witness box and then you can determine the rights and wrongs of this case.

I do not have to do a thing except offer testimony, if I think it is necessary after the plaintiff has

Qw 24

completed her case.

The plaintiff has the burden to prove that we, the Nevele Country Club, did something wrong and acquiesced in this wrong doing. If I can show you through the plaintiffs' witnesses or my own, if necessary, that we had nothing to do with this incident I will ask you at the end of the plaintiffs' case, at the end of the case for a verdict at your hands in favor of the defendants.

Thank you.

THE COURT: How many of the jurors have sat on a case in a federal court jury? One has. I am going to say a few things in view of that.

You are the judges of the facts. The Court must, whenever there is an objection made by one attorney to the other's questions, decide whether or not the question is appropriate and is not irrelevant, for example. That is, it must be reasonably related to the issue before you. If an objection such as that is made the Court may say, "Objection overruled", in which case the witness must answer. If, on the other hand, the Court decides to sustain the objection then the witness may not answer. I say that simply to promote your understanding of the procedure.

Very well, Mr. Wolff, call your first witness.

MR. WOLFF: Before I call my first witness, your Honor, I would like to announce to the jury undisputed fact number one in this case.

THE COURT: You may read the consession made in the pre-trial order.

MR. WOLFF: Ladies and gentlemen of the jury, I am reading to you from the pre-trial order which has been signed by the parties for this case. I read to you from the section entitled facts not in dispute to which there is no question between the parties.

"At the time of the incident involving Donna Ellen Tobin,Robert Stevens was and had been, since July 8, 1970, an agent, servant and/or employee of the Nevele Country Club."

There is no dispute about that fact, ladies and gentlemen of the jury.

THE COURT: Do you want to read number two?

MR. ECKSTEIN: May I?

THE COURT: Yes.

MR. ECKSTEIN: A fact not in dispute, "Mr. Stevens was referred to the Nevele Country Club for employment by Louis Employment Agency, defendant."

THE COURT: Very well.

Call your witness.

MR. WOLFF: Mr. Tobin.

B E R N A R D T O B I N , called as a witness, after having been duly sworn, testified as follows:

THE COURT: We have a little custom in court, and that is that while a witness is being sworn counsel remain seated and give your attention.

You may proceed, however.

DIRECT EXAMINATION

BY MR. WOLFF:

Q Let me call your attention to what the clerk has told you. Please keep your voice up. Talk at least as loudly as I am talking to you. It is important that everybody, the Judge, the jury and counsel for the defendant hear what you have to say.

Would you tell me where you live?

A I live in Willoughby Hills, Ohio, a suburb of Cleveland.

Q What is your occupation, Mr. Tobin?

A I am a pharmacist.

Q You are the father of Donna Ellin Tobin?

A Yes.

Q Do you have any other children?

A I have an older daughter.

Q How old is she?

A She is twenty-two.

Q I want to take you back to the summer of 1970. Tell me about the fact that your family decided to go on vacation and how you made the decision to go --

THE COURT: Counselor, your question is in bad form, I may say. Sustained as to form.

Q Did you take a vacation in the summer of 1970?

A Yes.

Q Where did you go?

A To the Nevele Country Club.

Q With whom did you go on that vacation?

A With my wife Shirley and my daughter, Donna.

Q Is that the same Donna Tobin sitting out here?

A Yes.

Q Did you go with any other people?

A No.

Q How long did you go and stay at the Nevele?

A We stayed a week.

Q Beginning on what date, if you can recall?

A July 7th.

THE COURT: When did you leave?

THE WITNESS: I believe it was the 12th or 13th. I think it was the 14th, July 14th, I believe that was a Tuesday.

Q Would you tell the ladies and gentlemen of the jury why you decided to go to the Nevele Country Club?

MR. ECKSTEIN: Objection.

THE COURT: Sustained.

Q Was there a selection made? Did you have any other considerations?

MR. ECKSTEIN: Objection.

THE COURT: Sustained. That is the same thing essentially.

MR. WOLFF: Can I approach the bench?

THE COURT: No, you may not.

MR. WOLFF: Can I make a proffer on this?

THE COURT: No, you may not.

Q Tell me from the time you left Cleveland until you got to the Nevele what took place.

MR. ECKSTEIN: Objection.

THE COURT: Sustained.

On the way to this location?

MR. WOLFF: Yes.

THE COURT: Sustained.

Q Prior to the time you went to the Nevele for your vacation in 1970, had you read any ads or brochures of the Nevele?

MR. ECKSTEIN: Objection.

THE COURT: Overruled.

A Yes, I had.

THE COURT: Have you got the ads?

MR. WOLFF: No, your Honor.

THE COURT: Next question.

Q Would you describe what you read in those ads or brochures?

MR. ECKSTEIN: Objection.

THE COURT: Sustained.

Q What was the payment to be for your week's stay at the Nevele?

MR. ECKSTEIN: Objection.

THE COURT: You are lowering your voice, counselor. Repeat the question.

Q What was the payment you were to make for your week's stay at the Nevele?

MR. ECKSTEIN: Objection.

THE COURT: I will allow what he did pay.

A Approximately $500.

THE COURT: That was for your wife, yourself and your daughter?

THE WITNESS: Yes.

Q Would you tell me whether or not that included your transportation there or not?

MR. ECKSTEIN: Objection.

I will withdraw the objection.

THE COURT: I thought the question was what you paid to the hotel.

MR. WOLFF: I wanted to make sure that was the question.

THE COURT: The question is ill advised, to say the least.

Did that include anything except the hotel expenses?

THE WITNESS: Just the hotel expenses, sir.

Q Would you start and describe for me what took place on the day you arrived at the Nevele?

MR. ECKSTEIN: I object.

THE COURT: I don't know how that is relevant. Sustained.

He arrived on the 11th.

I don't know what relevancy anything that happened on the 11th would be.

MR. WOLFF: If your Honor cared I would approach the bench.

THE COURT: I will not. I am not going to stop every five minutes to rule on questions of evidence which are apparently clear. If there is anything momentus I

will discuss it with you in the absence of the jury. I don't think this one is.

Q Mr. Tobin, would you tell me whether or not prior to July 11th you had any conversations or discussions with anybody employed by the Nevele with respect to the way in which your daughter would be supervised or cared for?

MR. ECKSTEIN: Objection.

THE COURT: Sustained. Officers, yes, or individuals here but not merely employees.

Q Did any officer or anybody who put himself forth as an officer of the Nevele prior to the incident describe to you the manner in which your daughter was to be supervised?

MR. ECKSTEIN: Objection.

THE COURT: Sustained in that form.

Q Mr. Tobin, do you know who Robert Stevens is?

A Yes.

Q Who is he?

A He is the individual who assaulted my daughter.

MR. ECKSTEIN: Objection.

THE COURT: Strike that out and disregard it. You have already established by the stipulation that he was an employee of a hotel. You are not going to ask such

questions as you just asked. I direct positively that you disregard that answer. You may move to strike it out.

MR. ECKSTEIN: I move to strike it out.

THE COURT: Strike it out. It must be completely disregarded.

Q Mr. Tobin, prior to the afternoon of July 11th, had you ever seen Robert Stevens?

A Yes.

Q Would you describe --

THE COURT: What day?

Q Would you describe when you saw him prior to the day of July 11th, 1970?

A The day?

Q Yes.

A The first day we arrived.

THE COURT: The 7th then?

THE WITNESS: Yes.

MR. ECKSTEIN: If your Honor please, I don't know if I am in order but there is a stipulation that he was employed from July 8th.

THE COURT: If that is so it doesn't make any difference that he saw him on the 7th, counselor.

MR. ECKSTEIN: It is an undisputed fact.

THE COURT: Yes, sustained.

Q Did you see him ever again?

MR. ECKSTEIN: Objection.

THE COURT: Since when?

MR. WOLFF: Between the 8th of July, 1970 and the afternoon of July 11th, 1970.

THE WITNESS: I saw him on the afternoon --

THE COURT: Just yes or no.

THE WITNESS: Yes.

(Continued on Page 34)

Q Would you describe what you saw and what you experienced?

MR. ECKSTEIN: I object to that unless we fix a time first which may be or may not be relevant to this matter.

THE COURT: Fix a time first.

Q When did you see him?

A I saw him in the early part of the afternoon.

THE COURT: What day?

THE WITNESS: July 11.

Q Where did you see him?

A I saw him lounging.

THE COURT: You saw him where?

THE WITNESS: In the lobby of the building we were staying in.

THE COURT: I am going to suspend and I am going to ask you counsel to come into the robing room with the Reporter. The jury will remain in the box.

(Robing room conference.)

THE COURT: Mr. Wolff, what is the proposed proof of what this witness saw about Stevens?

MR. WOLFF: The witness --

THE COURT: You are going to have something to show he was a futuristic rapist or something?

MR. WOLFF: The testimony I am trying to elicit from Mr. Tobin at the present time is of two categories.

THE COURT: Give me what the essence of it is without embellishing it or classifying it.

MR. WOLFF: I want to make sure I fully and correctly state my point for the record, your Honor.

THE COURT: Please do. I depend upon you to do that.

MR. WOLFF: The first thing for which I have been asking Mr. Tobin questions is in line with the leading case of McKee vs. Sheridan, the reliance upon which people will place on the hotel --

THE COURT: How are you going to get it from an employee?

MR. WOLFF: The quality and character of the hotel --

THE COURT: Is there anything about his appearance? Get to the point, for heaven's sake.

MR. WOLFF: The first point is the quality and caliber of a hotel is pertinent to determine what responsibility --

THE COURT: You don't get to the point. What did he see?

MR. WOLFF: It is important to convey that Mr. Tobin, relying upon ads and brochures and statements made

to him when he arrived there, was told that his daughter would be fully protected, completely supervised and at all times --

THE COURT: What is he going to say about seeing Stevens?

MR. WOLFF: He will say he saw Stevens lounging in the lobby. He will then say that Mr. Huff, Stevens' supervisor and the man in charge --

THE COURT: All I want to know now is thatyou want to show he was lounging in the lobby. That is out.

What else? That is, about seeing him if anything. Is there anything else?

MR. WOLFF: The fact that the evidence of seeing Mr. Stevens lounging in the lobby was offered to corroborate Mr. Tobin's proposed testimony that Mr. Huff,Mr. Stevens' supervisor, told him that in fact he had had reports that Stevens was lounging around the lobby and that Stevens was independent and hard to control. That is prior to the incident.

THE COURT: Will you repeat that?

MR. WOLFF: After --

THE COURT: You don't want to ask any more questions about seeing him in the lobby then, do you?

MR. WOLFF: Do I what?

THE COURT: You are not intending to ask this

witness, the father, anything else about seeing Stevens lounging in the lobby and that, of course, has been stricken, hasn't it?

MR. WOLFF: I was going to ask him when he saw Stevens and the fact he saw him lounge in the lobby to corroborate future testimony.

THE COURT: I don't see how it corroborates it one bit.

MR. WOLFF: In case the defendants put on Mr. Huff to deny his conversations with Mr. Tobin --

THE COURT: That is a matter for possible rebuttal at most. Let's go on with the trial.

MR. WOLFF: I want to make a further proffer.

I have asked Mr. Tobin questions which have been objected to and the objection has been sustained on about ads and brochures which he read and representations --

THE COURT: Was this a deposition?

MR. WOLFF: Ads and brochures which Mr. Tobin read prior to going to the Nevele.

THE COURT: Where are the brochures?

MR. WOLFF: He no longer has them. He can fully explain what was in them.

THE COURT: He can describe those?

MR. WOLFF: Yes.

THE COURT: What do you say about that?

MR. ECKSTEIN: The best evidence would be the brochures. That is not the best evidence.

THE COURT: That is probably true but maybe the next best is this.

MR. ECKSTEIN: There has been no notice to produce any of these brochures or ads or copies of it.

THE COURT: Does there have to be?

MR. ECKSTEIN: If they are not here and if he is going to rely on those.

THE COURT: You can get them by tomorrow.

MR. ECKSTEIN: We may not have them anymore.

THE COURT: You can have all the testimony as to what they contain.

How can he tell what they contain?

MR. WOLFF: He will tell, not only from the ads in the brochures but from the day he got there he was given a lecture about the fact --

THE COURT: Who gave any lecture?

MR. WOLFF: I am getting to that. When he went there, when he arrived, they told Mr. and Mrs. Tobin, you are to gohere for your eating and your activities. Your daughter is to go off with teenagers and children.

THE COURT: What does that have to do with this

case? She wasn't with teenagers.

MR. WOLFF: If I can make my proffer.

THE COURT: Do I have to pick at this as we go along in order to get sense into it?

MR. WOLFF: Let me start back then. The law states --

THE COURT: Give me what proposed facts. Don't tell me about law. I will attempt to know something about it.

MR. WOLFF: The Tobins went to the Nevele because ads and brochures and representations by the Nevele told them that they could go there and enjoy an adult's vacation apart from their child and at the same time their child could enjoy a vacation with totally supervised activities and being watched at all times. That evidence --

THE COURT: Going up and down elevators?

MR. WOLFF: That evidence goes to the standard of care and the duty of the Nevele to thoroughly investigate employees and to carefully supervise employees when they make promises to people that your children are in our hands at all times and you need not worry about them.

THE COURT: You know very well that that could not be. You don't expect that every time a child went up and down in the elevator that there would be supervision. I

don't know what right you have.

MR. WOLFF: I am not saying that.

THE COURT: You are saying something about something over here and it affects something entirely different.

MR. WOLFF: Evidence to show the degree of negligence in supervision and hiring of the Nevele --

THE COURT: That doesn't show it. You have to have some knowledge.

MR. WOLFF: Oh, no.

THE COURT: About hiring. You don't show it by these representations.

MR. WOLFF: People that present themselves to the public as offering the services that the Nevele claimed to offer is n egligent in both hiring and supervision if they fail to do anything but the perfunctory research they did into Mr. Stevens and, furthermore, when his supervisor, Mr. Huff having been informed prior to the incident that he was independent, lounging around and admitting that he was strange and acted funny.

When they put themselves forward to the public as providing the services they claim to have done they are negligent in supervising Mr. Stevens.

THE COURT: I can't follow you at all along those lines. The only thing I might do is if you can elicit from

this witness what specifically, specifically only, what was said on any of these brochures.

One, when did he get the brochure. Two, specifically what it said. I will allow that much, counsellor. I think I should. That is as far as I can see you can go with that kind of thing. Thatis the only thing I am concerned with this minute.

Certainly you can't go further with anything that Stevens may have said or anything --

MR. WOLFF: It is not Stevens, your Honor. When they went there the person responsible from the Nevele --

THE COURT: Who was he?

MR. WOLFF: They don't know his name.

THE COURT: Unless you can show who he was and he was an officer I am not going to take it. Let's proceed from there.

(In open court.)

THE COURT: You may reframe your last question, counsellor.

BY MR. WOLFF:

Q Mr. Tobin, tell us when, if you did, receive any brochures of the Nevele prior to your vacation?

A I received them from my travel agency.

THE COURT: When, he said.

THE WITNESS: I would say two weeks before.

Q Two weeks before you did what?

A Before we paid our deposit.

Q When did you pay the deposit?

THE WITNESS: I do not remember the exact date.

THE COURT: Go along.

Q Tell us if you can recall what any of those brochures specifically said about the Nevele.

A The Nevele was a family resort. There were activities --

THE COURT: What else?

THE WITNESS: There were activities --

THE COURT: That there were activities?

THE WITNESS: Yes, sir. For adults, teenagers and children with supervision especially good for the children and teenagers.

Q Do you recall anything else which those brochures specifically stated?

THE COURT: I will take it subject to a motion to strike. It may not be relevant to this case.

Q Do you recall anything further it specifically said?

A Nothing further than that.

Q Mr. Tobin, will you start on the afternoon of

July 11th and tell me and the ladies and gentlemen of the jury in this court what happened to you --

THE COURT: What happened to him? What's that got to do with this case? I think you have the cart before the horse. Maybe you should have called the young lady first.

I will permit you to withdraw this witness, if you wish. I merely suggest it.

MR. WOLFF: I withdraw him subject to recall, your Honor.

THE COURT: Of course, he must be recalled and be cross-examined, if nothing else.

Call the young lady.

MR. WOLFF: I call Miss Tobin.

D O N N A E L L E N T O B I N , called as a witness, being first duly sworn, testified as follows:

THE COURT: You heard the advice of your attorney here to speak up. Please do from now on so that we can all hear you.

DIRECT EXAMINATION

XXX BY MR. WOLFF:

Q Have you ever been a witness before, Donna?

A No

THE COURT: You don't speak up.

Q How did are you, Donna?

A Eighteen.

Q Are you in school?

A Yes, I am.

Q Where are you in school?

A I am attending a nursing school in Akron.

THE COURT: You don't speak up. These jurors can't hear you at that pace.

THE WITNESS: I am attending school in Akron, Ohio.

Q When is your birth date?

A May 12, 1955.

Q How old were you on July 11th, 1970?

A Fifteen.

Q You had just been fifteen?

A Yes.

Q And you were in high school at the time?

A Yes.

Q What grade?

A I was going to be starting high school.

THE COURT: You were where?

THE WITNESS: I was going to be starting the tenth grade.

Q You had just finished the ninth grade?

A Yes, sir.

Q And the tenth grade would make you a sophomore, is that it?

A Yes.

Q Starting on the morning of July 11th, 1970, would you please tell me what happened to you on that day?

MR. ECKSTEIN: Objection.

THE COURT: Sustained.

Q Would you start and tell me those events that took place on July 11, 1970 starting with when you first came in contact with Robert Stevens?

MR. ECKSTEIN: I object to that unless we get a specific time.

THE COURT: I suppose there may have been some prior meeting or something. I don't know whether that is it or not.

Q What was the time when you first came in contact on July 11, 1970 with Robert Stevens?

A It was around 3:00 o'clock.

Q Would you now describe for the jury and the Court starting at 3:00 o'clock on July 11th, 1970, your contact and what took place between you and Robert Stevens?

A I had come back from horseback riding.

THE COURT: I can't hear you and I am five feet away. Will you ask her to speak up again.

Q Talk as loudly as you can, please.

A I had come back from the horseback riding that they had at the Nevele and I was going back to my room to change and I went into the lobby to wait for the elevator and while I was standing and waiting for the elevator to come Mr. Stevens came over and started waiting with me and then when the elevator came we both got in and he said what floor are you going to and I said I already pushed the button.

THE COURT: You said what?

THE WITNESS: I already pushed the button for my floor.

THE COURT: You did?

THE WITNESS: Yes.

THE COURT: What button was it?

THE WITNESS: I don't remember.

THE COURT: What floor?

THE WITNESS: I don't remember. Then he pushed another button and he turned around and he pulled out a knife and he said if you say anything I am going to slash your throat.

THE COURT: He said what?

THE WITNESS: If you say anything I am going to --

MR. WOLFF: Can we take a break, your Honor?

THE COURT: Yes, if it is necessary.

We will have a recess.

(Recess)

(In open court, jury present)

THE COURT: You may proceed.

(Answer read)

THE WITNESS: If you say anything I am going to slash your throat.

Q Would you describe what Mr. Stevens looked like?

A He was a big, husky man. He was sort of fat. He had dark wavy hair and he was dark complected and he had small hands and he was wearing --

THE COURT: What?

THE WITNESS: Small hands. He was wearing a custodian's uniform like a workman's uniform.

Q You recall your last testimony where you left off.

Would you continue from that point on.

THE COURT: I don't understand that or what that means.

Q Donna, you just testified --

THE COURT: You want to ask her what happened next?

MR. WOLFF: Yes.

THE COURT: Then do it.

Q Would you tell us what happened next, Donna?

A Then the elevator went up to the top floor of the hotel and we got out of the elevator and he told me to walk down a hall and he had the knife open behind me.

THE COURT: He did what?

THE WITNESS: He had the knife opened behind me.

THE COURT: What did he say to you?

THE WITNESS: He just said to walk down this hall. He opened the door and we were on the roof of the hotel.

THE COURT: What door?

THE WITNESS: There was a door in the hall.

THE COURT: A door in the hall?

THE WITNESS: Yes.

THE COURT: Was it between -- well, first, did you get out of the elevator?

THE WITNESS: Yes.

THE COURT: Where were you then, some hall?

THE WITNESS: Yes, the top floor of the hotel.

THE COURT: Then you say you opened another door?

THE WITNESS: Yes.

THE COURT: What was that door to?

THE WITNESS: The roof.

Q What happened next, Donna?

A Well, we got out onto a cat walk on the roof and he said that he just wanted to talk to me and I said why did you have to pull a knife on me if you just wanted to talk to me and he didn't say anything. He was just smoking a cigarette and when he finished smoking a cigarette he kept on saying I am not going to hurt you --

THE COURT: Then what?

THE WITNESS: He said I am not going to hurt you why are you so scared.

Q Where were you standing at this time?

THE COURT: Let her go on and tell it or are you going to stop it?

Q Where were you standing at this time?

A On a cat walk by the door we had come off on on the roof.

Q Was there any fence or railing?

MR. ECKSTEIN: Objection.

THE COURT: Sustained.

Q Will you describe what the roof looked like?

A It was a flat roof. There was nothing on the edges and there were two doors sticking out of the roof and there was --

THE COURT: Two what?

THE WITNESS: Doors.

THE COURT: Where were they?

THE WITNESS: Sticking out of the roof.

THE COURT: Doors to the floor below, were they?

THE WITNESS: Yes. There was a cat walk, a boardwalk with railings on either side connecting the two doors.

Q Tell me what happened next.

A Then he pulled out a knife and he said that he is not going to hurt me and he started to unbutton my shirt --

THE COURT: I am sorry, but you don't speak loud enough so we can hear you clearly. Will you go back and start over again to the last question.

(Question read)

Q Would you continue from there, Donna.

A Then I started to back away and he said if you try to stop me I will kill you. Then he stuck his hand down my shirt.

Q Were you wearing undergarments at the time?

A Yes.

Q Did he in any way touch them?

MR. ECKSTEIN: Objection.

THE COURT: Sustained.

Q Can you tell us specifically what he did?

THE COURT: If anything further.

Q Yes, if anything further.

A Do you mean after this?

Q At this particular incident. Is there anything further you can say to describe what took place?

MR. ECKSTEIN: I would like to have an answer.

THE COURT: Is there an answer to that?

THE WITNESS: I don't know how to say it.

Q Donna, try to describe it. Counsel for the country club is awaiting your answer.

MR. ECKSTEIN: I object to the statement of what I am waiting for and what I am not waiting for.

THE COURT: Sustained as far as the last statement or merely admonition or suggestion to the witness.

Q Would you answer it to the best of your ability?

THE COURT: Answer to the best of your ability, if you can.

A Do you want me to say what happenedwhen he stuck

his hand on me?

THE COURT: I can't hear what the witness says.

MR. ECKSTEIN: I object to questions from the witness to counsel.

THE COURT: Sustained.

MR. WOLFF: I am going to go forward --

THE COURT: Don't comment. Ask your questions.

Q Would you describe what happened next?

THE COURT: You asked that two or three times in a number of ways. Can you proceed further and answer the question? Will you proceed?

THE WITNESS: When he was done putting his hand down my shirt he was just standing there for a while and then he started to unzip my pants and I tried to get away from him and he said if you try to stop me, I am going to kill you and he had the knife to my throat.

Then he stuck his hand down my underwear and that whole time he had the knife to my throat. Then when he was done with that --

THE COURT: Then when what?

THE WITNESS: When he was done with that he unzipped his pants and he exposed himself and he kept on telling me not to be scared because he is not hurting me and then he was standing there a little while and then he

said, "Why are you shaking" and he said he didn't hurt me and I shouldn't be scared. Then he said will you tell anybody about this and I said no and he said how I can be sure you won't tell anybody. I said I promise you I won't tell anyone and then he said he won't let me go until I stop shaking.

THE COURT: Until you what?

THE WITNESS: Stop shaking. I guess he figured --

MR. ECKSTEIN: Objection.

THE COURT: Don't guess.

THE WITNESS: He said we will leave now.

THE COURT: He said you would leave?

THE WITNESS: He said I will take you back to your room now and we turned to go down in the door that we went in originally and it was locked so we walked across the cat walk to the other door and that door was open and we started walking down some stairs and he said I am going to take you to your room and I said I don't want to go to my room any more. And we were just walking down some halls and I was trying to find a way to get out except there was no where to go but rooms and I didn't know if anyone --

MR. ECKSTEIN: Objection.

THE COURT: Not what you didn't know.

THE WITNESS: There was nowhere for me to go. I kept on walking down the hall.

THE COURT: Walking down the hall of the fifth floor or the top floor rather?

THE WITNESS: This was the floor underneath that where we had walked down some stairs.

THE COURT: It was below the top floor?

THE WITNESS: Yes. And I saw a guest trying to get in her room and I told her to help me and she said, "What can I do" --

MR. ECKSTEIN: I object to that and move to strike.

THE COURT: Disregard it and strike it.

Did you go down to your room?

THE WITNESS: I finally found some stairs and I ran down the stairs and I went towards the main building.

THE COURT: You have gone far enough here, haven't you, counselor?

MR. WOLFF: I have no further questions, your Honor.

CROSS EXAMINATION

BY MR. ECKSTEIN:

Q Miss Tobin, when you went to the Nevele Hotel

your intentions were to stay from the 7th of July until the 14th of July, is that right?

A Yes.

Q And you left the hotel with your parents on the 14th of July?

A Yes.

Q You stayed the entire week which you had intended to stay?

A Yes.

Q On the 11th of July at 3:00 o'clock had you had your lunch?

A Yes.

Q When you had your lunch, did you have that in the same dining room with your parents?

A Yes.

Q Were you sitting at the same table as your parents were sitting and being served?

A No.

Q You had your separate dining hall or dining compartment?

A Yes.

Q And that compartment or that dining room was used by the teenage group, is that right?

A Yes.

Q After you had had your lunch did you go back to your parents' table?

A Yes.

Q And did you then leave them at the table?

A Yes.

Q Then you went back to your room?

A Yes.

Q And you changed your clothes?

A Yes.

Q When you changed your clothes you put on jeans and a T-shirt?

A Yes.

Q And the T-shirt had three buttons?

A Yes.

Q And those buttons started at the neck and went down part-way down the chest, is that right?

A Yes.

Q When you went horseback riding was that a supervised activity?

A Yes.

Q Supervised by a counselor?

A Yes.

Q Wasn't that a voluntary activity, Donna?

A Yes.

Q It was a voluntary activity, is that right?

A Yes.

Q You had the choice of going or not going?

A Yes.

Q And there were other teenagers who did not go horseback riding that afternoon, is that right?

A I wouldn't know.

Q Did you make friends while you were at the Nevele?

A Yes.

Q Did any of those girls or boys go with you?

A Yes.

Q When you came back what time was it?

A From horseback riding?

Q Yes.

A Around 3:00 o'clock.

Q Did you deliver the horse to the stable?

A Yes.

Q It wasn't picked up by an attendant, was it?

A Well, no.

Q You delivered the horse and you went back to the Golden Gate building of the Nevele complex, is that right?

A Yes.

Q You then proceeded to the lobby of this particular hotel or building?

A Yes.

Q And you saw Stevens sitting in the lobby?

A Yes.

Q Was he near --

THE COURT: Excuse me just a minute, counsel. Was the room which you occupied in that building?

THE WITNESS: Yes.

Q Was Stevens sitting near the elevator?

A Yes.

Q How far was he from the door of the elevator?

A I would say from where I am sitting to the double doors right here, if they are the elevator, about from the stairs to the door.

THE COURT: Twenty feet?

THE WITNESS: I would say fifteen feet.

THE COURT: All right.

Q He was sitting a distance of about fifteen feet away from where you were standing waiting for the elevator, is that right?

A Yes.

Q When you got to the elevator, was the elevator on the floor where you were standing?

A No.

Q You pushed the button?

A Yes.

Q And when you pushed the button was Stevens still sitting where you had originally seen him?

A Yes.

Q Who got into the elevator first? He or you?

THE WITNESS: Can I explain?

THE COURT: You can answer the question whether it was he or you.

THE WITNESS: By the time the elevator came to the floor he was at the door too.

Q Then you were both standing by the elevator door before the elevator arrived, is that right?

A Yes.

Q Then the elevator arrived and the door opened?

A Yes.

Q Self-service elevator?

A Yes.

Q And you went in and pushed a button to the floor you wanted to go?

A Yes.

MR. ECKSTEIN: Unless my friend here has something to say --

THE COURT: Any more questions?

Q You pushed the button?

A Yes.

Q For your floor?

A Yes.

Q What floor was that?

A It wasn't the eighth floor but it was called the eighth floor.

Q Was that the top floor?

A No.

THE COURT: What was the floor on which you had your room?

THE WITNESS: It was really three floors up but it was called the eighth floor.

THE COURT: Was it on the same floor with your father and mother?

THE WITNESS: Yes, the same room.

Q You all occupied the same room?

A Yes.

Q Was that the top floor?

A No.

Q How many floors were there between your floor and the roof?

A Well, there was one floor and then the roof.

My floor and then another floor and then the roof.

Q When you walked in the elevator you pushed the button for your floor?

A Yes.

Q And the elevator proceeded to go up with you and Stevens in the elevator?

A Yes.

Q Did it stop at your floor?

A No, it didn't.

Q Did Stevens push the button?

A Which button?

Q Any button in the elevator.

A Yes.

Q What button did he push?

A The top floor.

Q And you pushed the fourth floor or third floor?

A Yes.

Q And it didn't stop at your floor?

A No.

Q You used that elevator before?

A Yes.

Q And when you pushed the button for the third floor the elevator stopped on the third floor?

A Yes.

Q And you did that the day before? You used the elevator the day before?

A Yes.

Q And you entered the elevator yourself?

A Yes.

Q And you pushed the button?

A Yes.

Q For your floor?

A Yes.

Q And the elevator proceeded and stopped on your floor, is that right?

A Yes.

Q But on this particular day you had pushed the elevator button for your floor and it didn't stop on your floor, is that right?

THE COURT: I don't hear your answer.

THE WITNESS: Yes.

Q And Stevens pushed the button?

A For which?

Q For any floor.

A Yes.

Q What floor did he push the button for?

A The top floor.

Q And then the elevator proceeded up to the top

floor?

A Yes.

Q When you got to the top floor you had a knife at your back?

A Yes.

Q What part of your back?

A Right here.

Q The small of the back?

A A little higher than the small of the back.

Q Up around this area?

A Yes.

THE COURT: Mid-way, I suppose.

Q How big a knife was it?

A It was about this long, I would say.

THE COURT: How many inches approximately?

THE WITNESS: Seven, eight inches.

Q Was that when it was opened it was seven, eight inches?

A Yes.

Q When it was closed it was three inches?

A Four inches.

Q And the blade was three, four inches?

A Yes.

Q And he had that mid-way up your back?

A Yes.

Q And you were walking in front of him?

A Yes.

Q And he told you where to go?

A No.

Q Did he direct you to go towards a particular door?

A There was only one hall.

Q Did he direct you to go to a particular door?

A Yes.

Q What door did he direct you to go to?

A It was the door that would open up to the roof.

Q Did you know if this door would open up before that particular day?

A No.

Q Did you say before there were two doors on this roof?

A Can I explain --

Q Did you testify that there were two doors sticking out of the roof?

A Yes.

Q And you had entered from one door and left from the other door?

A Yes.

Q And the door that you entered onto the roof was that open?

A I don't think so.

Q Did Stevens turn the knob?

A I think he used a key.

THE COURT: I can't hear you.

THE WITNESS: I think he used a key.

Q With what hand did he use a key?

A I don't really remember.

Q Where did he have the key?

A I don't remember.

Q Did he have the key in his pocket, Miss Tobin?

A I don't remember.

Q Did you see him withdraw the key from his pocket?

A I don't remember.

Q Did he have the key on a key ring?

A I don't remember.

Q Was that the only key he had or was it one of many keys?

A I don't remember.

Q And you don't remember what hand he held the knife in?

A No.

Q Did he hold it in his right hand or left hand,

you don't remember?

A I don't remember.

Q You don't remember what hand he used to open the door with?

A No.

Q And at that point when you had the knife in your back in the elevator or on the topmost floor of this building, did you scream?

A No.

Q Did you cry?

A Crying, you mean?

Q Did you cry as you were walking along the hall towards the door?

A I was crying.

Q You were crying?

A Yes.

Q You didn't tell that to your attorney, did you?

A What do you mean by crying?

Q Were you crying, as you cried before, were you crying?

A No.

Q Incidentally, when you had an examination before trial at the office of the attorneys for the defendant up on the Grand Concourse, do you remember you

went through this same questioning?

A Yes.

Q Did you cry then when you related this incident?

A No.

Q But you cried today. Was that because you were told to cry?

A No.

Q You cried involuntarily?

A Yes.

Q When you go to this door and you went out onto the roof, did he still have the knife at your back?

A Yes.

Q Was he beside you or behind you?

A When we were onto the roof?

Q Yes.

A After the door was closed he was facing me.

Q After you had walked along the cat walk?

A We didn't walk along the cat walk.

Q After you got out of the door you stood right by the door, right?

A Yes.

Q And as you proceeded up, he was behind you?

A Yes.

Q And when he opened the door he was still behind

you?

A Yes.

Q When he opened the door did he lean forward to turn the key into the keyhole and -- did he, yes or no?

A When?

Q Before you got onto the roof when he put the key into the keyhole --

A I don't remember.

Q After he had inserted the key in the keyhole, did he turn his hand one way or the other?

A I don't remember.

Q Did his body at any time while you were proceeding at the door or through the door touch your body?

A Yes.

Q Yes?

A Yes.

Q What part of his body touched your body?

A If I remember correctly it would be his arm.

THE COURT: What?

THE WITNESS: His arm.

Q What part of your body was touched by his arm?

A My back.

Q This part, the mid part?

A Yes.

Q No other part of your body was touched?

A No.

Q And he just brushed his arm along your back, is that right, as he was opening the door?

A As he was going --

Q As you were going through the door to the roof.

A Yes.

Q His arm touched your back?

A Yes.

Q And no other part of your body was touched by him at that time?

A Yes.

Q Correct?

A Yes.

Q When you got onto the roof you faced him and he faced you?

A Yes.

Q Did you speak with him?

A I said -- yes.

THE COURT: You did?

THE WITNESS: Yes.

Q At that time did you scream?

A No.

Q Did you cry at that time?

A Yes.

Q Actually had tears coming out of your eyes?

A Yes.

Q Did you stop crying? That is, at any particular time after that?

A Yes.

Q When?

A When he said that I have to stop shaking and crying or he won't let me go.

Q Then you stopped shaking, right?

A No.

Q You stopped crying?

A Yes.

Q When you stopped crying you were still shaking?

A Yes.

Q And that is the time that he opened the buttons --

A No.

Q When did he open the buttons on your blouse or T-shirt?

A When he was done smoking his cigarette.

THE COURT: When?

THE WITNESS: When he was done smoking his cigarette.

Q How long did it take for him to finish smoking the cigarette from the time that you first got onto the roof?

A A couple of minutes.

Q And during all these couple of minutes what were you doing?

A Standing there.

THE COURT: What's that?

THE WITNESS: Standing.

Q Crying?

A Yes.

Q Shaking?

A Yes.

Q When you finished smoking your cigarette, did you then stop crying?

A No.

Q Did you stop shaking at that time?

A No.

Q How long afterwards did you stop crying?

A When everything was over with and he said he wouldn't let me go unless I stopped.

Q When everything was over with?

A Yes.

Q You mean when he put his hand down your shirt?

A When he -- everything he did to me, when he was finished with all of it.

Q What he did was put his hand down your shirt, is that right?

A Yes.

Q And then you were still crying at this time?

A Yes.

Q You hadn't walked any part of that cat walk?

A No.

Q When he pulled your shirt down, with what hand did he do it?

A I don't remember.

Q It wasn't the same hand that he held the knife in, was it?

A No.

Q When he pulled your shirt down, where was the knife?

A His other hand.

Q Did it touch you?

A Yes.

Q What part of your body was touched by the knife?

A My neck.

Q Front or back?

A Front.

Q Where I indicate, right at the adam's apple?

A Yes.

Q He had it there?

A For a while.

THE COURT: I don't know if there is an adam's apple --

MR. ECKSTEIN: I don't know the medical term.

Q What we commonly call the adam's apple, that's where he had the knife?

A Yes.

Q When he put his hand down your shirt he still had the knife there?

A Not all the time.

Q When he didn't have the knife there, where was the knife?

A In his hand, I guess.

Q And you don't remember what hand --

THE COURT: She said I guess.

Q You don't know, do you, surely?

A No, I don't.

Q Then there came a time when he attempted to unzipper your Levi's or jeans?

A Yes.

Q Where was the zipper on your Levi's?

A In the front.

Q How big was that zipper?

A Four, five inches.

Q When he attempted to do that or when he opened the zipper, what were you doing?

A I was backing away from him.

Q When you backed away, how far did you back up?

A Maybe a foot.

Q A foot?

A Yes.

Q That's all?

A Yes.

Q Did he grab you around your neck at any time?

A No.

Q Did he grab any part of your body or touch any other part of your body except those which you indicated before?

A No.

Q He didn't grab your arm?

A I can't remember.

THE COURT: What is the answer?

THE WITNESS: I can't say for sure.

Q When he touched you at either part of your body did he bend down or did he get up? Was he standing straight

Ow up?

A. Pretty much.

Q Straight?

A Yes.

Q When he touched either or both parts of your body he hadn't opened his trousers or anything, had he?

A No.

Q After he had completed his job of putting his hand down -- touched parts of your body which you indicated, that is when he opened his trousers, is that right?

A Yes.

Q With one hand or two hands?

A I don't remember.

Q Where was the knife at that time?

A I don't know.

Q After this incident took place you went down back to the top floor, is that right?

A Yes.

Q Was Stevens walking with you at the time?

A Yes.

Q Was he walking behind you?

A No.

Q Did he have his knife out at that time?

A No.

Q How long did this incident take place?

Withdrawn.

How long did the incident occur in matter of time?

A About fifteen minutes.

Q During all this fifteen minutes you didn't scream?

A No.

THE COURT: Did you ever try to walk away?

THE WITNESS: No.

MR. ECKSTEIN: I have no further questions.

THE COURT: Any redirect?

MR. WOLFF: No, your Honor.

THE COURT: You are excused.

(Witness excused)

MR. WOLFF: I recall Mr. Tobin.

B E R N A R D T O B I N , resumed.

THE COURT: I suggest that you ask the mother and the daughter, if there are no objections, to leave the courtroom. I think there are benches outside.

DIRECT EXAMINATION CONTINUED

BY MR. WOLFF:

Q The incident took place on the 11th, is that correct?

A Yes, sir.

Q When did you leave?

THE COURT: I don't know whether this gets to his knowledge or not. That is established. You don't have to ask that.

Q When did you leave the Nevele?

A The following Tuesday.

THE COURT: What it the 14th?

THE WITNESS: Yes, your Honor.

Q Why did you stay until the 14th?

MR. ECKSTEIN: Objection.

THE COURT: Sustained.

(Continued on Page 78.)

Q Had you set down at the time of this incident any guide lines for your daughter and her dating habits or interactions with boys?

MR. ECKSTEIN: Objection.

THE COURT: Sustained.

Q After the incident took place, Mr. Tobin, did you have any conversations with any employees or officers or agents--

THE COURT: Officer, yes, employees, no.

Q Did you have any discussions with any officers of the Nevele?

MR. ECKSTEIN: I object--withdrawn.

Q Did you?

A I had conversations with people--

THE COURT: No, officers and that would be, I assume, one of the two Slutsky's.

THE WITNESS: No, none of the two Slutsky's.

Q Did you have with anybody else connected with the Nevele about this incident?

MR. ECKSTEIN: Objection.

THE COURT: Sustained.

Q Did you have a conversation with Mr. Stevens' supervisor?

MR. ECKSTEIN: Objection.

THE COURT: How does he know who the supervisor was? Sustained.

Q Did you learn who Mr. Stevens' supervisor was?

MR. ECKSTEIN: Objection.

THE COURT: Sustained.

That I suppose might be hearsay.

Q After this incident from that moment until the present have you noticed any changes in your daughter's conduct?

MR. ECKSTEIN: Objection. Unless it's going to be connected by proper expert medical testimony. That is as a causal connection between the incident--

THE COURT: If it is something which a layman might observe, I will take it. You may move to strike it out if it is not pertinent.

MR. ECKSTEIN: Once he gets it to the jury--

THE COURT: They will disregard it. I'm sure they will follow my instructions.

Q Yes or no?

A Yes.

Q What observations or changes have you noticed, Mr. Tobin?

THE COURT: Subject to a motion.

MR. WOLFF: I'm aware of that.

MR. ECKSTEIN: If your Honor please, the pretrial order and the pretrial memorandum states that there will be no doctors in this case.

THE COURT: Yes. Therefore, anything that gets into the expertise of a medical man or psychiatrist is out.

Q Did you notice any changes in your daughter's conduct after the incident until today?

MR. ECKSTEIN: I have to object to it, Judge.

THE COURT: I have noted your objection but I'm going to overrule it and allow what a layman might observe.

Q Would you answer the question?

THE COURT: It will be subject to cross examination.

A She has an extreme fear of going on elevators.

MR. ECKSTEIN: I must object and move to strike.

THE COURT: Strike it out.

Q Have you noticed any other changes in your daughter's conduct?

A When she returned to school she no longer participated in extracurricular activities.

MR. ECKSTEIN: I object and move to strike.

THE COURT: Yes, unless there is some appropriate proof of causal connections.

Q Why did she cease to participate in extracurricular activities?

MR. ECKSTEIN: Objection.

THE COURT: Sustained.

Of course, anything that was said by the daughter to the father isn't anything more or less but hearsay.

Q Has your daughter ever discussed the event with you at any time?

A Yes.

Q Has she expressed to you the effect this has had upon her?

MR. ECKSTEIN: Objection.

THE COURT: Sustained.

Q After the incident did you have a conversation with a Miriam Slutsky?

THE COURT: Are you prepared to show who she was?

MR. WOLFF: Yes.

THE COURT: Until that is forthcoming I will sustain the objection.

Q Did you ever come in contact with a Miriam Slutsky and did she identify herself?

A Yes.

Q How did she identify herself?

MR. ECKSTEIN: I object, if your Honor please. It's a selfserving declaration.

THE COURT: I will take it. It isn't entirely

selfserving.

Q How did she identify herself?

A "I am Miriam Slutsky."

Q Did she describe what function if any she had at the Nevele?

A No, she didn't describe her function.

THE COURT: That ends that expedition.

Q Did she tell you what responsibility she had if any for the operation of the Nevele?

MR. ECKSTEIN: Objection.

THE COURT: Same ruling. He has already answered that one.

MR. WOLFF: It's a different question and I want to know if he has a different answer.

THE COURT: I don't see any difference.

Q Did Miriam Slutsky do or say anything that conveyed to you her role at the Nevele?

MR. ECKSTEIN: Objection.

THE COURT: Already answered.

Q Would your answer to any of the last two questions be different than your preceding answer?

MR. ECKSTEIN: Objection.

THE COURT: Sustained.

I don't know what kind of a circumnavigation that

that is, Counselor.

Q Did you have a conversation with Mr. Huff?

A Yes.

Q Did he describe himself as to what his duties or responsibilities were at the Nevele?

MR. ECKSTEIN: Objection.

THE COURT: I will allow it.

A He was the supervisor of the housekeeping of the Nevele.

MR. ECKSTEIN: I object to that. He is drawing a conclusion. That is not a response to an answer.

THE COURT: Sustained.

Q What did Mr. Huff tell you his duties or responsibilities, if anything, were at the Nevele?

A Supervisor of housekeeping.

THE COURT: Did he tell you that?

THE WITNESS: Yes.

THE COURT: How did that happen? What was the occasion of that statement to you?

THE WITNESS: After the attack--

THE COURT: Wait a minute.

What was the occasion?

THE WITNESS: I went to an office and one of the Slutsky sons was there too and he was identified to me--

THE COURT: By whom?

THE WITNESS: By himself or Mr. Slutsky. I don't remember exactly who.

MR. ECKSTEIN: I move to strike.

THE COURT: Strike it. He can't tell which one it was.

THE WITNESS: Mr. Huff.

THE COURT: By himself then only?

MR. ECKSTEIN: I object and move to strike.

THE COURT: I won't strike it out. I will leave it in for such weight as it may have.

Q What did Mr. Huff tell you his duties and responsibilities were at the Nevele?

A To supervise--

MR. ECKSTEIN: Objection.

THE COURT: Same ruling. I thought that was already answered.

THE WITNESS: To supervise the housekeeping activities at the Nevele.

THE COURT: Housekeeping?

THE WITNESS: Yes.

THE COURT: He didn't say anything about an elevator?

THE WITNESS: No, sir.

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Q Did he tell you what if any supervisory capacity he had with respect to Robert Stevens?

MR. ECKSTEIN: Objection as leading and suggestive.

THE COURT: Sustained.

Q Tell me what Mr. Huff told you.

MR. ECKSTEIN: I object to that, if your Honor please.

THE COURT: It's already answered.

Q Did he say anything more than what his job was?

A Yes.

Q Would you tell the ladies and gentlemen of the jury what Mr. Huff said to you?

MR. ECKSTEIN: I am going to object.

THE COURT: Sustained. I don't know what else there would be to tell.

Q Did he tell you something else?

A Yes, sir.

MR. ECKSTEIN: I object. We have the conversation.

Q Is there more to the conversation than his identity?

THE COURT: I will take you into the robing room. The jury may go to lunch now and come back at 2:15.

(Jury left courtroom.)

(Robing room conference.)

THE COURT: Mr. Wolff, what is the proposed testimony from this witness, the father, as to what else was said?

MR. WOLFF: I wish to make the following proof with respect to those questions elicited by me of Mr. Tobin and to which objections have been sustained--

THE COURT: I'm not going to listen to that. I'm through with that.

MR. WOLFF: I want to put it on the record--

THE COURT: Will you first answer my question, Counselor. I will proceed in that manner. Whether it is necessary to go back may depend upon what else you say or the witness will say was said by Mr. Huff.

MR. WOLFF: Mr. Huff will state--

THE COURT: Is he being called?

MR. WOLFF: Mr. Tobin will state that Mr. Huff said that he had supervisory authority over Robert Stevens. That it would be reported to him that Stevens had been seen lounging around the lobby. Furthermore--

THE COURT: That's out. That's nonsense.

MR. WOLFF: Furthermore, he will say that he believed--

THE COURT: Who believed?

MR. WOLFF: Huff.

THE COURT: Said that he believed.

MR. WOLFF: Said that he believed--

THE COURT: Get it straight. Tell me what your witness, the father, will say.

MR. WOLFF: It would expedite matters if you allow me to finish--

THE COURT: Quite the contrary, Counselor. I won't.

MR. WOLFF: Mr. Huff in the testimony of Mr. Tobin, said that in addition to the statement about finding Mr. Stevens lounging in the lobby that he found Mr. Stevens to be strange and that he acted funny and that he found him to be a very independent employee.

THE COURT: Is that all?

MR. WOLFF: That's all for Mr. Huff.

THE COURT: That's out. That doesn't prove anything. It doesn't prove he was a rapist or anything.

MR. WOLFF: Miriam Slutsky told Mr. Tobin that she was in charge of the matter and she was the person whom he should discuss anything about the incident involving his daughter at the Nevele. In a conversation which Mr. Tobin and his wife were present, Miriam Slutsky told the Tobins that with respect to the hiring of Robert Stevens they had done nothing more than take him from Louis Employment Agency and that they had

not in any way made any checks on any references or background.

THE COURT: I will reserve on that. Have you finished on your proposal about the coming question?

MR. WOLFF: No.

THE COURT: What else is there?

MR. WOLFF: With respect to the question of why the Tobins left on the 14th, after the incident took place on the 11th, the answer is the Tobins stayed on after the incident because they were told by the police that they had to remain there to be witnesses at the hearing involving Mr. Stevens and that hearing was on the 14th.

THE COURT: What do you say to that?

MR. ECKSTEIN: Mr. Wolff, I believe, in his interrogatories, Mr. Tobin said that he was there for a week and stayed the week. There was no other reason. He booked reservations for a week and after the week was over he left.

MR. WOLFF: Would you point out the interrogatory where it says that?

MR. ECKSTEIN: In the deposition. I will look it up and let you have it.

THE COURT: Get it now so I can give you a disposition in this before you go to eat.

Did the father pay the $500 or did he get it back?

MR. WOLFF: He got part of it back and they tried

to stamp a release on the back of the check and he said, "What is this?" and they said that "It's nothing," and he read it and he said he refused to sign it.

THE COURT: This isn't before me.

MR. WOLFF: He crossed it all out anyway.

MR. ECKSTEIN: Page 29, Mr. Wolff, if you have it.

"Q And went down to dinner?

"A Yes.

"Q And your daughter too?

"A Yes.

"Q Incidentally, how long after that did you remain at the Nevele?

"A We stayed, oh, our last few days we were supposed to stay there a week."

THE COURT: Is there anything there, Mr. Eckstein, as to what has been stated by your adversary about his staying because of any charges?

MR. ECKSTEIN: "In other words, your original intention was to stay a week?

"A We stayed through Monday.

"Q You originally intended to stay a week?

"A Yes.

"Q So you left there Monday or Tuesday?

"A That's correct, Monday."

There is nothing in there about anything else other than what I said.

THE COURT: What is the specific question you want to ask Tobin? That is, about that phase?

MR. WOLFF: Why they stayed. I agree his statement is correct, they did stay. I want to ask why.

THE COURT: I believe you have already previously asked why he stayed, haven't you?

MR. WOLFF: Yes.

THE COURT: Didn't I sustain the objection?

MR. WOLFF: Yes.

THE COURT: I still do.

MR. WOLFF: I make my proffer as to why I asked the question and what evidence would be elicited and he said they would stay because he was told by the police they had to remain in order to be witnesses at a hearing with respect to Mr. Stevens.

THE COURT: You think that alters the situation?

MR. WOLFF: Since the objection to my question has been sustained--

THE COURT: I think that that might be prejudicial because it involves an inference at least that there was some criminal proceeding.

MR. WOLFF: If the question cannot be answered and

the objection sustained then I move that this Court instruct defense counsel that any references or attempt to argue the fact that the Tobins stayed after the incident which in some way reflects upon the degree of damage or the severity of the incident--

THE COURT: I don't think it does.

MR. WOLFF: --be precluded.

THE COURT: I don't think it does, Mr. Eckstein.

MR. ECKSTEIN: Whether it does or it doesn't, I have a perfect right to comment on that, I think.

THE COURT: You have a right to comment perhaps but it is pure speculation or at least it's only a possible inference. I can't preclude your adversary in arguing the effect of some facts such as that and I won't but I'm not going to allow the question.

MR. WOLFF: If Mr. Eckstein is allowed to comment in any way on the fact that the Tobins stayed after the 11th with respect to making an argument, that this in some way curtails the severity of the injury to Donna Tobin, then I respectfully request that I be allowed to ask questions--

THE COURT: Nonsense. I don't see what difference it makes whether he stayed for one week or another. That doesn't affect the amount of injuries. That's irrelevant.

Is there anything else?

MR. WOLFF: I want to finish my proffer. If he does make such comment that I be allowed to make comment that the reason they stayed was because they were told to by the police.

THE COURT: That I will not allow, Counselor. You certainly jump over the bounds. If you attempt to do that I shall have to stop it.

Is there anything else?

MR. WOLFF: Yes.

THE COURT: You have a whole laundry list there.

MR. WOLFF: Yes, I do. I want to make the following additional proffers:

I intended to ask Mr. Tobin questions about the way in which he instructed his daughter with respect to her dating habits and inner relationships with boys.

THE COURT: And I sustained the objection. You say I should do otherwise?

MR. WOLFF: I am making my proffer, your Honor.

THE COURT: Make it briefly because I don't have much confidence in your proffer.

MR. WOLFF: Because I believe that an explanation of the way in which Mr. Tobin instructed his daughter adds to the setting and helps the jury assess the damage to the girl because the evidence will come forward that Mr. Tobin was a

very strict individual who only allowed his daughter, at the time of the incident, to go out in groups with boys, did not allow her--

THE COURT: But he allowed her to go up the elevator alone.

MR. WOLFF: He did not allow her to go out at all on dates. He severely restricted her social activities.

THE COURT: I still sustain the objection.

MR. WOLFF: That I ask question of Mr. Tobin to which objections to the questions were sustained in the following area:

I asked him what visible changes he had seen in his daughter's conduct and to explain what had happened from that incident to the present. He would have said the following things:

That although his daughter had been very active in high school activities prior to the incident, after the incident she did not participate in any activities which required her to come home from school after sunset.

THE COURT: How can you state that that is a cause?

MR. WOLFF: Two, that his daughter told Mr. Tobin that the reason she did not stay for these activities was because of the incident and her fear that something may happen to her.

THE COURT: What do you say, Counselor?

MR. ECKSTEIN: That must be Washington practice. It's not the hearsay rule.

THE COURT: SAme ruling.

MR. WOLFF: Further, he would have testified that his daughter from the incident to the present has not gone in his presence--has not gone on elevators by herself but has always walked up stairs or waited until other people got into elevators with her.

MR. ECKSTEIN: That's even worse than it was.

THE COURT: Same ruling, Counselor. I take it we are through?

MR. WOLFF: Let me double check, your Honor.

THE COURT: Suppose you double check over the noon recess. Do it on your own time.

MR. WOLFF: One last statement.

I strike that, I have no further statements.

(Luncheon recess taken.)

AFTERNOON SESSION

2:15 p.m.

(In open court. Jury present.)

THE COURT: You may continue your direct.

MR. WOLFF: I have no further questions.

THE COURT: Cross examination?

MR. ECKSTEIN: No cross.

THE COURT: You are excused.

(Witness excused.)

MR. WOLFF: I call Mrs. Tobin.

S H I R L E Y T O B I N, called as a witness herein, having first been duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. WOLFF:

Q Mrs. Tobin, will you tell the ladies and gentlemen of the jury in this court what reason you had, if any, for selecting the Nevele Country Club for your vacation in the summer of 1970?

MR. ECKSTEIN: Objection.

THE COURT: I don't think it's material. Sustained.

Q After the incident involving your daughter and Robert Stevens did you have any conversations or meetings with any officers, agents or employees of the Nevele?

MR. ECKSTEIN: I object unless they are limited to officers.

Q Did you have a conversation with a Mrs. Miriam Slutsky?

A Yes, I did.

Q Would you describe the conversation?

MR. ECKSTEIN: Objection. I am going to object to it on the ground there is no proof as to who this lady is and whether or not she is an officer.

Q Did Mrs. Slutsky describe what her role at the Nevele was?

MR. ECKSTEIN: Objection.

THE COURT: I will take it as I said before. That's in connection with the husband's testimony.

Q Did Mrs. Slutsky tell you what her position was at the NEvele?

A She was in charge.

THE COURT: Did she, yes or no?

THE WITNESS: No.

Q Did she tell you what role she served at the Nevele?

MR. ECKSTEIN: Objection, if your Honor please, that's the same question in different words.

THE COURT: Read the other question. I think he said

officer then.

(Whereupon, the pending question was read back by the reporter.)

THE COURT: I will take it.

A No.

Q Did she tell you what duties she performed at the Nevele?

MR. ECKSTEIN: Objection as leading.

THE COURT: Sustained.

Q Did Mrs. Slutsky in any way describe to you what authority if any she had at the Nevele?

MR. ECKSTEIN: Objection.

THE COURT: Sustained.

She has already said she hadn't been told what her role was or what office she held.

MR. WOLFF: I think there is a distinction between those, your Honor.

THE COURT: Between what?

MR. WOLFF: My last question and the previous one.

THE COURT: I didn't notice any substantial difference. Sustained.

Q What did Mrs. Slutsky tell you?

MR. ECKSTEIN: Objection.

THE COURT: Sustained.

Q Would you describe and tell the jury what was the substance of your conversation with Mrs. Slutsky?

MR. ECKSTEIN: Objection.

THE COURT: Sustained.

Q In the summer of 1970, prior to the incident of July 11th, had you ever given Donna Tobin, your daughter, any instructions about dating or how her social activities should be regulated?

MR. ECKSTEIN: Objection.

THE COURT: Sustained.

Q Did you ever tell her whether there would be any restrictions upon the type of activities in which she could do when going out with boys and other young people?

MR. ECKSTEIN: Objection.

THE COURT: Sustained.

Q Did you notice any changes in your daughter's conduct after the incident of July 11th?

MR. ECKSTEIN: Objection.

THE COURT: I will take it, as I think I said this morning, subject to a motion to strike.

Q Did you notice any changes?

A Yes.

Q Would you describe to the ladies and gentlemen of the jury what changes you noticed in your daughter's behavior?

A She became a more private person.

THE COURT: More what?

THE WITNESS: Private, to herself, extremely modest and frightened.

Q Anything else?

MR. ECKSTEIN: I object to the use of the word "frightened." I think that may be construed as a medical term and not as a layman's term.

THE COURT: You may move to strike that out.

MR. ECKSTEIN: I move to strike.

THE COURT: Strike it out.

I instruct the jury to disregard it.

Q Do you recall any specific instances on which her behavior was different than what it was before the incident of July 11th?

MR. ECKSTEIN: Objection.

THE COURT: Sustained.

Q Did you ever reach any decisions as to how you thought you, as the girl's mother, should handle the situation after the incident?

A Yes.

MR. ECKSTEIN: Objection.

THE COURT: Sustained.

Motion to strike out the answer, granted, disregard

it.

MR. ECKSTEIN: I move to strike, of course.

THE COURT: Yes.

Q Did you ever reach any conclusions or in any way reach any decision about what you thought would be the best way to handle your daughter and her condition after the incident?

MR. ECKSTEIN: Objection.

THE COURT: Sustained.

MR. WOLFF: No further questions.

MR. ECKSTEIN: No cross.

THE COURT: You're excused.

(Witness excused.)

THE COURT: Any other witnesses?

MR. WOLFF: No.

THE COURT: Plaintiff rests?

MR. WOLFF: Plaintiff rests.

THE COURT: For certain reasons, members of the jury, the witnesses of the defendant could not reach the court today and so I am adjourning the court, as far as you are concerned at this time.

Come tomorrow at ten o'clock, please. You may go now.

(Jury left courtroom.)

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THE COURT: What do you want to say? I see plaintiff's lawyer standing. You rested, didn't you?

MR. WOLFF: I called no more witnesses. I want to offer the interrogatories of Nevele Country Club.

THE COURT: You said you rested. I don't know what it meahs in the District of Columbia, but it means rests in all features.

MR. WOLFF: I don't think--

THE COURT: You think incorrectly.

Get the jury back in here.

(Jury returned to the courtroom.)

THE COURT: I'm sorry, members of the jury, to have to call you back. I think the plaintiff's lawyer said he rested. Instead I think he meant something else, namely that he was offering no other testimony but now he tells me after you left that he wants to read some matters, questions or answers, from either interrogatories or depositions. So to get as far along as we can today that's why I called for your return. Thanks for coming back.

MR. WOLFF: I wish to offer the interrogatories propounded in the Nevele Country Club and the answers supplied.

THE COURT: That's not the way you do it. At least that's not the way to do it up here. The way to do it is to offer concrete questions and concrete answers to the

questions. Counsel may object to relevancy. The way it should be done is for you to indicate which interrogatory you wish to offer and then I will ask counsel if heobjects on relevancy grounds, usually.

Which one is it? These are whose interrogatories?

MR. WOLFF: The answers to the interrogatories--

THE COURT: You have questions, whose questions?

MR. WOLFF: Plaintiff's questions, your Honor.

THE COURT: Which ones?

MR. WOLFF: Question number three.

THE COURT: State all of them.

MR. WOLFF: Four, six and eight.

THE COURT: Is that all?

MR. WOLFF: Yes, your Honor.

THE COURT: You might tell me which, if any of these, you object to, Mr. Eckstein?

MR. ECKSTEIN: If I may be so bold, I can't locate the interrogatories in my file. Can I see yours?

THE COURT: Do you have any objections?

MR. WOLFF: I can read the questions.

THE COURT: You cannot read the questions. They cannot be read until the question of relevancy is decided. You shouldn't have suggested it.

MR. ECKSTEIN: No objection, Judge.

THE COURT: All right. Read three.

MR. WOLFF: (Reading):

"Q When Nevele, through its agents, servants or employees--"

THE COURT: I don't know that I have those here, Counselor. Wait a minute. Do you have a copy?

MR. WOLFF: Just a copy.

THE COURT: What did you do with the originals?

MR. WOLFF: They were filed with the Court.

THE COURT: These would be filed by your firm, wouldn't they?

MR. WOLFF: Yes.

THE COURT: All right. I have it now.

MR. WOLFF: (Reading):

"Q When Nevele through its agents, servants or employees made any check, investigatory search into Stevens' ability to perform services?

"A Yes, interview as to qualifications to do the work for which he was hired."

Part B--

THE COURT: You just read 3A.

MR. WOLFF: B, "The names, addresses, phone numbers and job descriptions of all agents, servants and/or employees of Nevele who made the check, investigatory

research referred to in A above?

"A Alice McDole, housekeeper, Nevele Hotel, Country Club."

3C, "The dates when all such checks, investigatory research were made.

"A On or about July 8, 1970."

D, "The names, addresses, phone numbers of all persons contacted or responsible to with respect to such checks, investigations or research.

"A Stevens."

E, "The date, center and recipient or author of all correspondence, memoranda or other documents which discuss in any way the checks, investigations or research by Louis referred to in A above. Attach a complete copy of each such document."

E, item 3A does not refer to checks, investigations or research by Louis.

4, "For how long was Robert Stevens employed at the Nevele Country Club prior to July 11, 1970?

"A July 8, 1970."

6, "Did Nevele interview Stevens prior to permitting Stevens to work for the Nevele?

"A Yes."

B, "The name, addresses, phone numbers and job

descriptions of all persons who interviewed Stevens.

"A Alice McDole, housekeeper, Nevele Country Club."

C, "The substance of the questions asked by the interviewer and the answers given by Stevens."

C, "Regarding ability and qualifications to do the work."

D, "The length of time taken by the interview.

"A About one half hour."

E, "Whether any documents exist which evidences in any way the interview conducted with Stevens."

E, "No."

7, "For what job did Nevele originally hire Stevens"--

THE COURT: I didn't hear anything about 7. You said 6 and then 8.

MR. WOLFF: 8, "The name, addresses, phone numbers and job descriptions of all agents, servants or employees of Nevele who supervised Stevens."

B, "The name and address, the employee, agent or servant of Nevele to whom Stevens reported."

And the answer to A and B, "Fred Huff, last known address Nevele Country Club, and Alice McDole."

That's all of number 8.

THE COURT: Anything else?

MR. WOLFF: No, your Honor.

THE COURT: Now you rest?

MR. WOLFF: Now I rest.

THE COURT: This is final?

MR. WOLFF: This is final.

THE COURT: Now the jury may go.

(Jury left courtroom.)

THE COURT: You aren't going to make any motions, are you?

MR. WOLFF: I want to make a proffer with respect to Mrs. Tobin's testimony.

THE COURT: My heavens, don't you understand that if I accepted the proffer I would need the jurors? Your method of conducting the trial is anything but conducive to an acceleration of the trial. We have what it seems some theatre, they go in and they go out. I don't like it. I'm going to tell you so right here and now. If there is any more of this concealed weaponry you just get it out of your system now.

What is the proffer you want to make?

MR. WOLFF: The proffer with respect to the questions asked Mrs. Tobin to which objections were made and sustained--

THE COURT: You're going over those again?

MR. WOLFF: No.

THE COURT: Just the way you did as to Mr. Tobin?

MR. WOLFF: I was going to summarize and say that the proffer made with respect to Mrs. Tobin as to the questions asked about conversations with Mrs. Slutsky, her daughter's dating habits, incidents and changes in the daughter after the incident and why they went to the Nevele, those answers would be the same as those which I proffered on behalf of Mr. Tobin.

THE COURT: Are you through with the proffer?

MR. WOLFF: If the Court deems it necessary I will expand upon it.

THE COURT: I don't deem anything necessary for a plaintiff, Counselor. That's up to plaintiff's counsel. I'm not going to be put in a position as to telling you, or to a defendant, as to what he should or should not prove.

Are you through with your proffer?

MR. WOLFF: I offer the same proffer with respect to Mrs. Tobin as I offered with respect to Mr. Tobin in those questions dealing with Mrs. Miriam Slutsky, what Donna Tobin's dating habits and social regulations were at the time or around the time of the incident.

Thirdly, what changes Mrs. Tobin noticed in her daughter's behavior after the incident and, fourthly, the

reasons why the Tobins decided to spend their vacation of 1970 at the Nevele Country Club.

Thank you.

THE COURT: What do you say, Mr. Eckstein? Do you still object?

MR. ECKSTEIN: I still object the way I said before.

THE COURT: Same decision as before.

Are we through?

MR. WOLFF: Yes, your Honor.

THE COURT: You rest now?

MR. WOLFF: Yes.

THE COURT: This is final?

MR. WOLFF: Yes.

THE COURT: I will entertain motions and I suggest the first motion be with reference to the punitive damage claim.

MR. ECKSTEIN: If your Honor please, I move to dismiss that portion of the complaint, the cause of action which relates to punitive damages on the ground there has been no proof.

THE COURT: I am inclined to grant it. Do you want to argue that question?

MR. WOLFF: Yes, your Honor.

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THE COURT: Go ahead very briefly. I'm rather inclined, as I suggested, to grant the motion. I don't see anything here which conforms with the case that was mentioned in the robing room this morning.

MR. WOLFF: The testimony which would go to the issue of punitive damages--

THE COURT: It has to be on the testimony which has been put in. Don't make the contingent. What testimony do you say you have put in successfully which can require the summation of a punitive damage question to the jury?

MR. WOLFF: The interrogatories which show the total lack of concern of an institution of the reputation and caliber of the Nevele and one which presents itself to the public in the fashion--

THE COURT: Is there anything willful about that?

MR. WOLFF: Yes, it's willful disregard and willful disregard and wanton conduct are two of the many qualities that allow for an award of punitive damages.

THE COURT: Is that all you want to say?

MR. WOLFF: I want to further say that the testimony which was elicited but objected to and sustained--

THE COURT: I'm not concerned with that at all. You should know that if you have practiced law in any court of higher court than some local area. You know that. You

can't base your proof on something that wasn't admitted. I don't think I should have to explain that to you.

MR. WOLFF: In addition to the interrogatories, your Honor, I think the testimony that Stevens, who from the interrogatories is a porter, was given some sort of free access or the ability--

THE COURT: Free access to what?

MR. WOLFF: The keys which allowed him to get on the roof and commit the act which caused the problems of this lawsuit.

THE COURT: Is that all?

MR. WOLFF: On the evidence there was received--

THE COURT: Is that all?

MR. WOLFF: On the evidence received, yes, your Honor.

THE COURT: What do you say to this objection, Counselor? I will let you reply, Mr. Eckstein.

MR. ECKSTEIN: I haven't anything further to say, Judge. There has been no proof as to any malice, condonement, ratification or anything.

THE COURT: Motion granted.

Is there another motion?

MR. ECKSTEIN: I move to strike that portion of the testimony with Mr. Tobin and Mrs. Tobin with respect to

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the actions of the daughter after the incident. There was no medical connection.

THE COURT: What do you say in answer to that, Mr. Wolff?

MR. WOLFF: There is only need for medical testimony when it is of such a caliber that the average lay juror cannot understand and realize that a connection can be drawn. On such a simple, basic matter as a daughter's fear of going into elevators, I think you do not need--

THE COURT: Who testified about her fear? Did she or the father and mother?

MR. WOLFF: The father and mother. The father also testified that she would not go in the elevators alone. The mother talked about her turning inward, her becoming private.

I think it doesn't take a doctor to tell a jury there is a connection between a child being molested sexually and her turning inward after the incident. I don't think we need medical testimony on that.

THE COURT: What do you say on that, Mr. Eckstein?

MR. ECKSTEIN: I object to any question of being molested sexually. There is no such testimony. In the second place, if your Honor recalls, I objected to the use of the word "frightened" because that was a medical term. There is

no testimony at all by any doctor to connect any action or reaction to this particular incident.

THE COURT: Dependent upon possible opinion and observation of the parents, whatever there was.

MR. ECKSTEIN: Who knows what it was before or subsequent. It may be something which is medically connected, psychiatrically connected.

THE COURT: The motion is granted.

MR. ECKSTEIN: I move to dismiss the action, the entire action on the ground the plaintiff has failed to prove any negligence on the part of the defendants Benjamin Slutsky and Julius Slutsky on the ground that the plaintiff has failed to show any scope of the employment--I withdraw that. Failed to prove that Stevens was employed to do what he is alleged to have done in this particular incident on July 11th.

There is no action ratified by the defendants. His duties were as housekeeper or a porter and that's all. He was lounging around at the elevator. That in itself is not a violation of any civil act.

THE COURT: Let's see if we can sum up your particular thrust there.

One, you say it was not within the scope.

MR. ECKSTEIN: There is no proof.

THE COURT: What else is there outside of that?

MR. ECKSTEIN: There was no ratification on the part of the defendants--

THE COURT: That's unnecessary, I think. And the third?

MR. ECKSTEIN: No authorization.

THE COURT: There is no proof of ratification and there is no proof of authorization. Where that leaves us on this is something on which I probably should reserve. I am inclined to think, however, Mr. Wolff, and Mr. Eckstein, that there may be some liability here and I am going to determine that over until tomorrow.

MR. WOLFF: I wonder if I can put a few remarks on the record in response to his statement?

THE COURT: About what?

MR. WOLFF: His motion.

THE COURT: You did. How many times or how many shots do you want? You're given a chance to say something about it and then you speak and then when you lose you ask for more.

However, I will let you put them in as a matter of grace. That's not what we practice.

MR. WOLFF: These are the first remarks I have made in response to his motion to dismiss the case.

THE COURT: I will assume that for the sake of

argument.

MR. WOLFF: I will be very brief--

THE COURT: About what motion?

MR. WOLFF: His last motion. I call the Court's attention to McKee versus Sheridan, Inc.--

THE COURT: I know the case, I tried it. There are two sentences which dispose of all his arguments. I shall consider that decision fully.

MR. WOLFF: Can I read into the record the one sentence?

THE COURT: I don't think you need to. I know where it is. I tried the case or the subsequent case, the second trial.

MR. WOLFF: For the record, I think it is important that I read it.

THE COURT: Read what?

MR. WOLFF: From McKee into the record.

THE COURT: The decision?

MR. WOLFF: Two lines from it.

THE COURT: I don't care to listen to one. I can read.

Anything else? I reserved on this fundamental motion which goes to the basic liability and issue. I will notify you tomorrow as to my decision on that.

Come into the robing room for a minute.

(Robing room conference.)

THE COURT: Thank you, gentlemen.

(Trial adjourned to December 13, 1973 at 10:00 a.m.)

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BERNARD TOBIN, et ano,

v

71 CIV 3030

NEVELE HOTEL, INC., et al

December 13, 1973
10:00 A.M.

(Trial resumed, in open court, jury present)

THE COURT: We have heard the plaintiffs' case. The defense, through Mr. Eckstein, wishes to introduce testimony this morning. Call your witness, Mr. Eckstein.

MR. ECKSTEIN: If it pleases the Court, the defendant rests.

THE COURT: Very well.

I will excuse the jury.

(Jury left courtroom)

THE COURT: I have an outstanding motion which I reserved to today.

I have considered it carefully and I believe I am compelled and I do deny that motion.

Is there any further motion?

MR. ECKSTEIN: At this time --

THE COURT: I don't know that there is any motion which could be made since there is no difference now than there was yesterday.

MR. ECKSTEIN: I just want to reiterate the

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motion and add to it the fact that there has been no proof --

THE COURT: For the reasons you stated yesterday?

MR. ECKSTEIN: Yes.

THE COURT: I still must deny that motion.

What do you want to say?

MR. WOLFF: I think on the basis of the evidence presented and the law applicable that the plaintiff would move for a directed verdict on the issue of the liability.

THE COURT: What do you say to that, Mr. Eckstein? The motion is a directed verdict on liability.

MR. ECKSTEIN: I will join in that motion, Judge.

THE COURT: You will?

MR. ECKSTEIN: Yes.

THE COURT: The motion is granted. Therefore, the only thing to submit to the jury is damages, counsel, correct?

MR. ECKSTEIN: Yes.

THE COURT: And you say so too?

MR. WOLFF: Yes, your Honor.

THE COURT: Very well. I will have a recess. That means that I wish to alter my charge somewhat although I expected this motion.

(Recess)

THE COURT: After an off the record discussion,

your consent is withdrawn but I grant the motion for a directed verdict as to liability.

MR. ECKSTEIN: If your Honor please --

THE COURT: You don't consent to it but I am granting it over your objection.

MR. ECKSTEIN: Not withstanding the fact that there still is a question as to whether or not this act was done within the scope of the employment.

THE COURT: That makes no difference. It doesn't have to be done in the scope of the employment.

MR. ECKSTEIN: It wasn't ratified or consented to or ordered.

THE COURT: There is no proof that it was. However, that is not a requirement for compensatory damages. It is for punitive damages.

MR. ECKSTEIN: I will take an exception.

THE COURT: All right.

We will still have to submit damages then.

(Recess)

(In the robing room)

THE COURT: It is my belief as I indicated outside in the courtroom that a motion may be made for a directed verdict on liability. And that in such instance that still leaves with the jury the question of damages.

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However, I will allow each attorney to, if you have any cases on the subject, let me know. In the meantime, I have asked one of my clerks to look up that question and the other clerk is coming with the charge on damages. If you want to go to the library downstairs on the twenty-fifth floor, go ahead.

MR. WOLFF: I am in agreement with the Court's opinion.

THE COURT: I know you are. I don't ask for mere agreement, I ask for authorities.

MR. ECKSTEIN: I need a little time on that, Judge.

THE COURT: Do you want to call your office?

MR. ECKSTEIN: I want to call my office and get the man up there who has the authority on his fingertips. It probably won't take too long.

MR. WOLFF: We will briefly go to the twenty-fifth floor.

(Pause)

(In the robing room)

THE COURT: I want to say that the combined efforts of myself and my two clerks have found no case which precludes the proposed action which I heretofore directed. That is, that since a motion has been made and

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granted upon the request of the plaintiff to direct a verdict as to liability that there is any reason why the jury cannot try the damages. I think it is most appropriate that they do. And there are other various fundamental propositions along the same line which may not be directly in point but which certainly tend to establish that that may be done.

What is it you wanted to do, Mr. Eckstein?

MR. ECKSTEIN: I wanted to talk -- off the record.

THE COURT: Yes, off the record.

(Discussion off the record)

(In open court, jury not present)

THE COURT: I have indicated on the record my ruling. I have granted a motion to have a direct verdict or enter a directed verdict against the defendant on liability only and I therefore direct trial of the damage question before the jury.

Now, I want to know timing. How much time -- and maybe I asked you this before -- but this should be a de novo.

How long do you need now just to damages, of course counsel, actually need?

MR. WOLFF: Ten minutes to open and ten minutes

Qw6

for rebuttal.

THE COURT: What do you mean by that? Where did you get that system from?

MR. WOLFF: It's been the system I follow in every other case. If I only have to argue first I ask for twenty minutes initially.

THE COURT: I ask counsel if he wants to take that arrangement. I assume it works this way: Counsel will take, say, ten minutes for the direct argument and then you will have your time and then if he reserves ten out of the twenty or five out of the twenty he gets rebuttal. That has some advantage to you because he knows what he is going to say. If you are not going to say it say so. If you are willing to take it, say yes.

MR. ECKSTEIN: Judge, I have to modify that. I thought the custom was that the defendant opens to the jury and then the plaintiff opens to the jury and that is it.

THE COURT: Yes, that is it for the opening but it isn't for the closings. Now I will have to enlighten you.

MR. ECKSTEIN: If you will please.

THE COURT: I will. In the closings, in this court at least, unless specially modified defendant speaks

first on summation and then the plaintiff. There is no rebuttal.

MR. ECKSTEIN: That is what I said.

THE COURT: I didn't think you said that. Your memory is not too good.

MR. ECKSTEIN: I meant summation. The defendant sums up first and then the plaintiff sums up.

THE COURT: You don't want to take the other method which I --

MR. ECKSTEIN: I thought it was a usual and customary method.

THE COURT: It is. I am asking you if you want to take it.

MR. ECKSTEIN: No. I want the ordinary method.

THE COURT: We will comply with what is usually done in this court. It is not the way in which you stated.

MR. WOLFF: I would request then twenty minutes, your Honor.

MR. ECKSTEIN: I want about ten minutes, Judge.

THE COURT: You can take up to twenty.

Get the jurors and I will have to tell them, what's been done.

Did either side have any requests to charge on damages?

Qw8

MR. WOLFF: Yes, your Honor.

THE COURT: If so we will have to pass on those.

(In open court, jury present)

THE COURT: There are no requests to charge from the defendant. Do you mind if I state these now or do you want it in the robing room, Mr. Wolff? Do you object to my ruling on the requests to charge now?

MR. WOLFF: No.

THE COURT: Number 14 is refused. 15 is granted as charged and 18 is refused.

Counsel , have you copies of the plaintiffs' requests to charge?

MR. ECKSTEIN: Yes.

THE COURT: I will repeat what I said for your benefit.

MR. ECKSTEIN: I have it, Judge.

THE COURT: Do you have it, Mr. Wolff?

MR. WOLFF: Yes.

THE COURT: You realize, ladies and gentlemen, that the case is now finished insofar as the proof or the evidence is concerned. The plaintiffs proof has been submitted. The defendant has chosen within its right not to submit any proof and no other development has been made which will shorten the summations and it will shorten

your duties. At the pre-trial the only issues which are to be submitted to you or the only issue is damages. I shall charge you subsequently on that and the only issue which will be considered by the attorneys in their respective summations is damages.

Now, a word about summations generally. Summations must be based upon the facts which were admitted into evidence. Nothing that is not in evidence is properly referred to by counsel in the summations. They realize that. That will be, no doubt, adhered to.

Secondly, the order of the summation is inverse to that of the opening statements. In the opening statements the plaintiff came first and the defendant came second. In the summations it is reversed because the plaintiff has the burden of proof of not only having the proof on liability but it has the burden of proof on what the damages are. Accordingly we will hear first from defense counsel, Mr. Eckstein.

MR. ECKSTEIN: If it pleases the Court, Mr. Wolff, ladies and gentlemen of the jury: May I, on behalf of all of us, thank you for your patience and your kind attention which you gave us during the course of this trial. To get right down to the crux of this case I am going to review, to the best of my recollection, the testimony which you

Qwl0

heard from the witnesses.

Starting with Donna, I recollect that she testified that she and her parents arrived at the hotel on July 7th and were to stay there for a week and remained for a week and left on July 14th. I further recollect, and I want to say to you that my recollection is not taken for granted. It is your recollection and nobody else's which determines your verdict. Donna testified that on July 11th at around 3:00 o'clock she had come back from horseback riding and was going to change her clothes. She awaited at the elevator and one who she later discovered to be Robert Stevens was at the lobby lounging around and doing nothing else. She pushed the button and the elevator arrived. She entered the elevator, pushed a button for her floor. Stevens followed her, pushed a button for the top floor and they proceeded up. At that time a knife was put to the body of Donna and they went to the roof and an incident took place, an incident which we are very sorry occurred but an incident over which we have no control.

After the incident she went downstairs. He left the roof with her, went down one floor, could not get the elevator and she went downstairs to the lobby of the hotel and at that point there was no further testimony.

There isn't a scintilla of evidence of any

humiliation at that point or any other points. There isn't a pennies worth of expenses on the part of Donna, her father or her mother. The only thing we have an incident occurring which we are sorry occurred but this incident did not occur because we authorized or --

THE COURT: You don't need to get into that. That is another problem. There is no proof of authorization but it isn't necessary.

MR. ECKSTEIN: I say to you why should the hotel be penalized to the extent of paying this girl or her father damages for something which they had no control of?

(Continued on next page)

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THE COURT: Disregard that statement. That of course is in effect water over the dam. I have decided that these defendants are liable. Proceed with other matters about whatever the contentions are relative to damages.

MR. ECKSTEIN: It is my contention, Judge, that this is all part of the damages. Putting the hands into the pocket of my clients to compensate this plaintiff for something over which we had no control and did not authorize. That is my contention.

THE COURT: I again say that the jury must disregard that statement. Don't mention it any more.

MR. ECKSTEIN: Ladies and gentlemen, I say to you that as far as the testimony of the witness on behalf of the plaintiff is concerned there isn't a scintilla of evidence which would cause you to pay to this girl any money by reason of the fact that there has been no proof as to humiliation and there is absolutely no proof as to out of pocket expenses. If you believe me from that point I ask you for a verdict in favor of the defendants.

THE COURT: Mr. Wolff.

These are damages only insofar as the young lady is concerned. There is no claim here for any damages sustained by the father.

MR. WOLFF: I want to address you briefly solely

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on the question of the damages in this case. The Judge has told you the issue of liability has been resolved and the defendants are liable.

I am not going to go through the incident again because, as I told you in my opening statement, it can only be classified as an incident of horror. It does no good for me to describe it again because I am sure that after once hearing that story it is firmly ingrained in anybody's mind no matter whether only hearing the story or whether they are the person that is actually involved.

Mr. Eckstein who represents the Nevele Country Club and Ben J. and Julius Slutsky and who speaks on their behalf says there is no humiliation, there is no pain, there is no suffering. If you feel that way and you agree with him then you must follow his suggestion. But I just ask you to think about that incident as you recall it and wrestle with thenotion that with that incident there can be no pain, no suffering and no humiliation. I cannot and I would not think of telling you what I think the damages are because I am one and you are eight. Six people who collectively bring to bear on this matter experiences of wide-ranging nature.

Some of you are parents, some of you are aunts or uncles and know or can develop the idea of what an experience

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like this is on a 15-year old girl like Donna Ellen Tobin. It is your collective experience as the six of you deliberate to reach a decision as to what did happen and how this did affect her. Then we ask you for a judgment, a judgment is the only thing you can do if it was all humanly possible, it would be asked to have you as the jury erase this matter from her mind.

But that cannot be done. The only thing a jury can do is to attempt to compensate Donna for what has happened because you know if you were her parents you would feel the same. If you had all the money in the world --

MR. ECKSTEIN: This is not proper summation.

THE COURT: I don't think the last statement is proper. It is the young lady's effect, the effect on the young lady and not the parent.

MR. WOLFF: All I say, your Honor, and ladies and gentlemen of the jury, is anybody who heard this would want to remove this matter from her mind. That cannot be done.

THE COURT: You said that, counsellor.

MR. WOLF: You heard the story, you know what is there. I ask youto bring to bear your collective wisdom on this matter and return a judgment --

THE COURT: A verdict. There will be a judgment thereafter if there is a verdict.

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MR. WOLFF: Return a verdict that will from your understanding of human life and your evidence and what has been before you that will compensate for the matter, a matter thatwill tell the Nevele Country Club that you understand what this girl has gone through, that will tell Ben J. and Julius Slutsky, the defendants who do not even sit here in this courtroom what it means.

THE COURT: That is unnecessary. They have no obligation to come to this court. You may disregard that.

MR. WOLFF: You will tell this courtroom, you will tell everybody who learns of this verdict that you understand what this girl has gone through.

MR. ECKSTEIN: Your Honor --

THE COURT: Yes, that is not exactly according to the best version of summation. There is no punitive damage here and it is compensatory only and telling people outside of this courtroom what was done is out of order. Will you please stick to your issues and complete your statement as soon as reasonable.

MR. WOLFF: I only ask one thing, and that is that you return a verdict which reflects and brings to bear your full understanding of this evidence and what you and you alone believe to be what is needed to compensat e this girl for this incident.

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That is all I ask and I thank you.

MR. ECKSTEIN: I object to that last remark.

THE COURT: No, I don't see anything wrong with that remark, counsel. I shall have to deny any objection.

The next phase of this case will be a charge by the Court. It is now 20 minutes to 12. I think the best thing is to take a recess at this time and ask you to come back at 1:00 today. Please heed my instructions.

One more thing, I believe and I understand that you have elected a foreman, Mr. Sherser, No. 5, is that correct?

JUROR NO.5: Yes.

THE COURT: When you come back will you sit in the number one place and will the young lady who is there sit in your place, please.

(Jury left the courtroom.)

THE COURT: May I have any exhibits which refer to damages.

MR. BECK: I don't believe there are any, your Honor.

(Recess for lunch.)

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THE COURT: Ladies and gentlemen of the jury: You are now about to enter upon your final function in this case as the jurors and to decide the facts. You are the sole and exclusive judges of the facts. You pass upon the weight of the evidence, the credibility of the witnesses and you determine the reasonable inferences to be drawn. It is my duty now to instruct you as to the law and in turn it is your duty to accept these instructions as to the law and to apply them to the facts as found by you in the course of your deliberations.

In your determination of the facts you will rely solely upon your own recollection of the evidence. What I said from time to time and what I may say in this charge or what counsel may have said during the course of the trial or during the course of their explanations is not to be taken by you in place of your own recollection of the facts.

No comments by counsel or by Court are evidence. You are to draw no inferences from them. During the course of this trial I have been required to pass upon questions concerning the admissibility of evidence. As I told you in the beginning you are the ones who determine the facts. It is the Court's duty to determine what facts may be considered by you for your determination. You are to draw no inferences from the Court's rulings with respect to the admission

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or the rejection of evidence. Such rulings relate solely to questions of law and they need not concern you as tryers of the facts. Neither are you to be concerned by questions asked by the Court nor that the Court asked questions. These questions were asked solely to elicit or clarify facts at issue. Nothing that the Court said is to be construed to indicate to you what your determination as to th e issues presented to you now should be except, of course, that I expect you to follow these instructions.

You must completely ignore answers by witnesses made either voluntarily or in response to a question where such answers have been stricken. They may form no part of the evidence and may not be considered by you in determining your verdict.

The statements made by the attorneys in their explanations are not facts or evidence. As I told vou in the beginning, the evidence comes from the testimony of witnesses onthe stand. There were no exhibits admitted into evidence relative to this question which is to be submitted to you. And I believe there were no depositions read or parts of depositions which related to these present issues.

Now obviously you are to approach your duties here cooly and calmly without emotion. Both direct and cross examination should be considered. You may draw certain

inferences from testimony but you are not permitted to draw inferences from other inferences. No verdict may be based upon speculation or conjecture.

We begin with this fundamental principle, that the plaintiff having made the charge has the burden of proving the material allegations relative to the matter of damages by a fair preponderance of the credible evidence. This, the fair preponderance of the credible evidence, means the greater weight of the evidence.

It refers to quality rather than the number of witnesses. It means that the testimony on the part of the person on whom the burden rests must have more convincing weight than that opposed to it.

You may say that a fact is proved by a fair preponderance of the evidence when all of the credible evidence, after you have considered the facts presented and after you have considered the credibility of the witnesses in question, tends to persuade you to believe what these witnesses have said against any other facts that may have come into the case.

If it is evenly divided on a particular claim of damages then you have to determine against the person who has the burden of proof. As I said, the burden is on the plaintiff. If after considering all the evidence you find

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that as to a given factual element it preponderates in favor of the plaintiff then she has sustained her burden of proving her case by a fair preponderance of the credible evidence.

On the other hand, if the credible evidence is evenly divided or if the evidence is not sufficient to produce the burden of proof necessary then that item, of course, cannot be sustained in favor of the plaintiff.

I may say as to damages: the plaintiff has the burden in the first instance to prove her damages by a fair preponderance of the credible evidence and she must establish the nature, the extent and effect of such injuries or of this incident which we may call it.

The defendant has no burden or obligation to come forward with any evidence. He does not have any obligation to disprove anything. Whether or not they do, the fact remains that the defendants are entitled to a verdict as to a given issue if the plaintiff fails to sustain her burden of proof. Now the defendant here or the defendants, these two owners, must respond to all damages flowing from and in the natural consequence of this breach of duty of liability which has now been established.

You need not be concerned as to the reasons for this liability or why there is no question to submit to you on that basis. Nor are you concerned by the mere fact that that has

been in accordance with the law and accordance with the support deemed to be established.

You are concerned only here with the measure, with the question of what the damages should be. Your verdict on that must be based upon the facts determined without bias or sympathy, without emotion. These damages cannot be remote. They cannot be speculative. They cannot be conjectural. They are purely compensatory.

They, of course, should be neither inadequate nor, onthe other hand, excessive. They must bear some reasonable relationship to any harm here that the plaintiff has found to have suffered. They are the damages as I have said before resulting to the minor, Donna Tobin.

Now the plaintiff, Donna Tobin, claims damages for mental distress. And its allied nature. There is no claim for any other damages. With respect to the claim for mental distress, that claim is limited to the actual incident and from the time of the incident to the present.

There is no claim for future mental distress or injuries other than have been referred to already.

These damages, as I have said, are called, in the law, compensatory damages, because they are intended to compensate this plaintiff for theinjury done to her. These compensatory damages are not punitive in nature. It isn't

jqk6

intended nor is it permitted for those damages to include punishment or to set an example or anything of that sort.

There is no claim in this case now for anything but compensatory damages. Mental distress may be severe when it is of such intensity and duration that no reasonable person should be expected to endure it. In your consideration of what award for mental distress the plaintiff is entitled to, as I noted above, you must observe the nature of the actions of this employee Stevens together with the effect of such conduct on this minor plaintiff.

Such consideration of the effecton this minor necessarily includes humiliation, embarrassment and emotional and mental distress experienced by her and to have occurred.

In this respect you may consider the plaintiff's age at the time of the incident, which was 15.

jqv 1

Now, after having given you, I believe, the basic legal instructions which you must follow in the results in your deliberations I proceed to the facts. I am going to be very short in my treatment of the facts and please bear in mind that this is only my recollection. It's going to be brief, and you may consider all of the evidence, all of the testimony which relates to damages. The fact that I may not relate to certain testimony and that I do to other parts of the testimony is not intended in any way to suggest that you disregard any testimony.

The infant, now eighteen years of age, fifteen at the time of the incident on July 11, 1970. This occurred about 3:00 p.m. It began in the elevator. You heard what happened there. You heard what happened on the roof possibly to some extent subsequent to the episode on the roof. She described the actions of Stevens. I do not need to repeat them. Although she did say that she did not scream or attempt to run away it appears that at the time Stevens, during this episode, maintained a knife at her back. So much for my brief summary of the facts. You must decide it upon all of the relevant testimony.

As I have previously indicated to you, you are the sole and only judge of the credibility of each and every witness and of the facts. You are to determine credibility. You

jqv 2

have to use your own good common sense. You saw and heard the witnesses as they testified and from your ordinary common sense you must determine the question of any credibility if it's presented to you.

You may also take into consideration the interest which any witness has in the outcome of the case. Obviously the plaintiff Donna is interested but an interested witness is not necessarily unworthy of belief. It is merely one of the factors which you must consider.

You came into this jury box yesterday and I assume, and I believe, without any preconceived views, ideas or opinions concerning the rights of either of these parties here, that is of the plaintiff or of the defendants.

What you know about this case must have been learned solely from what has been present to you. Your final determination of the amount of damages here must be based upon the facts as presented in this courtroom. Each of you, of course, are entitled to your own opinion but you are expected and required to exchange views with your fellow jurors when you deliberate. And then to discuss and to consider the evidence, to listen to the arguments of your fellow jurors, present your own individual point of view and then reach an agreement solely and only on the evidence and without violence to your own judgment.

jqv 3

You are not to yield, for example, simply because you are outnumbered. You should vote with the others only if you are convinced on the evidence and the law as I have stated it to you, that it is the proper way to decide the case. On the other hand, you shouldn't hesitate, if you are convinced by a fellow juror, to change your point of view if your original opinion appears later to have been erroneous.

Now, to return a verdict here it must be unanimous. That is concurred or agreed upon by all of the six deliberating jurors. I remind you here that plaintiff and the defendants, on the other hand, are entitled to even-handed justice. They stand equally before you. Sympathy, bias or prejudice must play no part in your determination of these damages. I wish to say this, if you send any notes to the Court let the foreman write out the note. Let the foreman sign it, and Mr. Foreman, I instruct you at no time should you or members of the jury volunteer any information concerning your deliberations on a proposed verdict or that you stand so and so and so and so.

This verdict, of course, must set forth in dollars the amount of the damages which you have unanimously concluded should be awarded. All of your determinations, of course, should be made in accordance with these instructions which I have now given you.

jqv 4

You are, of course, to deliberate in secret and after you have returned your verdict you will have concluded your duties here in this case. But you are not compelled to reveal or discuss with anyone your private impressions or your deliberations. You need not even listen or respond to any questions about this which may be asked of you. Although I do not order it I strongly recommend that you decline to talk to anyone who approaches you on this subject.

With that I submit this case to you with the full confidence that you each live up to your oath of office.

Are there any exceptions, Mr. Wolff?

MR. WOLFF: No, your Honor.

THE COURT: Mr. Eckstein?

MR. ECKSTEIN: Yes, sir.

THE COURT: Very well.

I will excuse the two alternates now. You may get whatever items of any kind you have in the jury room and you are to return on Monday.

(Alternate jurors excused.)

(Robing room conference.)

THE COURT: What is it, Mr. Eckstein?

MR. ECKSTEIN: I except to that portion of your Honor's charge which states that damages are to follow from the date of the incident to the present date.

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THE COURT: What do you say, Counselor? Anything wrong with that?

MR. WOLFF: With what he says?

THE COURT: Yes.

MR. WOLFF: Yes. I think that's how damages are measured. You asked me earlier in the proceedings--

THE COURT: I want nothing but no comment and it's on the books. I refuse to alter it. No future damages were to be permitted. Anything else?

MR. ECKSTEIN: I object to that portion of the charge which says that plaintiff is entitled to recover damages for mental distress and her present day conduct without any medical testimony.

THE COURT: Any comment by you?

MR. WOLFF: There is no need for medical testimony.

THE COURT: I have noted your objection. You have an exception.

MR. ECKSTEIN: I further object to that portion of your Honor's charge which states that damages follow from mental distress without any medical testimony.

THE COURT: Same ruling.

MR. ECKSTEIN: That's all I have.

THE COURT: All right.

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(In open court.)

THE COURT: Ladies and gentlemen, you may retire to commence your deliberations.

(At 1:25 p.m. the jury went out to commence their deliberations.)

(In open court-jury not present.)

THE COURT: Since the reporter is here now, you may ask the Marshal to bring in the jury.

(At 1:30 the jury returned to the courtroom.)

THE COURT: Mr. Foreman, members of the jury, I regret that I had to call you back. I am uncertain as to whether I charged you with respect to one factor which you must consider in connection with your deliberations. As to the damages which you may deal with in this case you can only allow such damages as are proximately caused by the incident in question and proximately caused means that they follow from these acts without any intervening cause of any kind, that is, that they are the natural effects in the reasonable consideration of such acts of the man Stevens.

MR. WOLFF: That's fine, your Honor.

THE COURT: You may retire.

(At 1:32 p.m. the jury retired to resume their deliberations.)

(At 2:30 p.m. a note was received from the jury.)

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THE COURT: This is the note we just received:

"If the jury establishes a figure that represents our feeling of damages incurred can we establish a figure that would be free and clear of court costs and attorneys fees or must we set a figure irrespective of those costs", signed by the foreman and mark it as an exhibit.

I suggest that I tell them that they must decide what they conclude has been proved by a fair preponderance of the credible evidence were the damages sustained by the plaintiff and that they are not concerned with anything else.

(Court's Exhibit 1, marked.)

THE COURT: Bring in the jury.

(In open court-jury present.)

(At 2:37 p.m. the jury returned to the courtroom.)

THE COURT: I received your note, Mr. Foreman, which reads as follows:

"If the jury establishes a figure that represents our feeling of damages incurred can we establish a figure that would be free and clear of court costs", I think that's what it means, the words are reversed, "and attorneys' fees or must we set a figure irrespective of those costs?"

My answer to that is simple. You must establish a figure that you believe represents the proof by a fair preponderance of the credible evidence of the damages suffered

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by this plaintiff and pursuant to all of my instructions. Nothing else is to concern you. I think I have answered you.

You may retire.

(At 2:38 p.m. the jury retired to the jury room to deliberate upon a verdict.)

(At 2:50 p.m. a note was received from the jury.)

(Court's Exhibit 2 is marked.)

(At 2:55 pm. the jury returned to the courtroom.)

THE COURT: Call the roll.

(Roll called at this point.)

THE CLERK: Mr. Foreman, have the jurors agreed upon a verdict?

THE FOREMAN: Yes, we have.

THE CLERK: Mr. Foreman, when I ask you the next question please say that we find that the plaintiffs were-- to whatever damages you find.

Mr. Foreman, have the jurors agreed upon a verdict?

THE FOREMAN: Yes.

THE CLERK: How do you find?

THE FOREMAN: We find that the damages to the plaintiff should be $30,000.

THE CLERK: Ladies and gentlemen of the jury, listen to your verdict as it stands recorded. You say you find for the plaintiff in the amount of $30,000 and so say

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you all?

(Jury polled at this point.)

THE COURT: Very well. The jury is excused now. Thank you for determining this case.

(Jury excused.)

THE COURT: Any motion, Mr. Eckstein?

MR. ECKSTEIN: If it please the Court, the defendant moves to set aside the verdict upon the ground that the damages was awarded against the credible word of the evidence and against the law.

THE COURT: The jury has spoken. This is a peculiar case. I don't know how I could possibly say that I am shocked by the verdict. I shall have to deny your motion.

MR. ECKSTEIN: I move on behalf of defendants to set aside the verdict on the ground that it is excessive.

THE COURT: That motion must be denied.

MR. ECKSTEIN: Thank you.

THE COURT: We have remaining this claim by the defendants, your clients, against the agency. Do you wish to submit any further testimony, either side on that?

MR. ECKSTEIN: May we have a couple of days to mull that over, Judge so we can come back?

THE COURT: Are you able to decide as to your side

jqv 10

of the question, whether you want to submit anything?

MR. ARKOW: I will stand on the record as it is.

THE COURT: Your answer is that you don't want to submit any other testimony?

MR. ARKOW: I don't.

THE COURT: However, you may after you hear from the plaintiffs.

MR. ARKOW: Correct.

THE COURT: Will you tell the Court or notify the Court and notify your adversaries here by Monday? Can you do that?

MR. ECKSTEIN: How about by Tuesday or Wednesday?

THE COURT: Make it Tuesday.

MR. ECKSTEIN: Make it Wednesday, Judge.

THE COURT: All right. Then I shall try to fix a time, if there is to be further testimony on either side. I would like to have you tell me what you calculate the time would be because I would like to fit it in. I don't want to give up a day if it's necessary or even a half day.

I should pass out to you the usual forms which instruct you as to the post trial papers after a nonjury trial. I don't suppose you have any here now. You will get them in due time.

MR. ECKSTEIN: Thank you.

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THE COURT: Very well. That's it, Mr. Wolff. The case is ended.

MR. ECKSTEIN: The defendants ask for a stay of thirty days of execution. We may want to appeal and get the papers ready and file a notice of appeal. Of course if an appeal is to be had we will have to put up a bond, naturally.

THE COURT: You will put up a so called superseding bond.

MR. ECKSTEIN: The bond required on an appeal.

THE COURT: What harm is there, Counsel, Mr. Wolff? There will be interest on it.

MR. WOLFF: I have no objection to a stay for thirty days from today.

THE COURT: Thirty days stay is granted against any execution of this verdict and the clerk, however, is directed to enter the verdict for $30,000 and marked subject to the stay.

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JUDGMENT.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

The issues in the above entitled action having been brought on regularly for trial before the Honorable Richard H. Levet, United States District Judge, and a jury on December 12 and 13, 1973, and the jury having returned a verdict in favor of the plaintiff, it is,

ORDERED, ADJUDGED AND DECREED, that plaintiff, BERNARD TOBIN, as FATHER AND NEXT FRIEND OF DONNA ELLEN TOBIN, A MINOR, have judgment against the defendants, BEN J. AND JULIUS SLUTSKY, A PARTNERSHIP DOING BUSINESS AS NEVELE COUNTRY CLUB, in the amount of $30,000.00.

Dated: New York, N. Y.
December 18, 1973

RAYMOND F. BURGHARDT
Clerk

NOTICE OF APPEAL BY DEFENDANT NEVELE COUNTRY CLUB.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

NOTICE is hereby given that NEVELE COUNTRY CLUB, one of the defendants above named, hereby appeals to the United States Court of Appeals, for the Second Circuit, from a final judgment entered in this action on December 18, 1973.

Dated: New York, January 10th, 1974

Yours, etc.

TROPP, GOLDFINGER & BERSON
By LEO E. BERSON
A Member of the Firm of:
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TO:

Clerk of United States District Court
Southern District of New York

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CROSS-NOTICE OF APPEAL BY PLAINTIFF.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

NOTICE IS HEREBY GIVEN that BERNARD TOBIN, plaintiff in the above-named action, hereby appeals to the United States Court of Appeals for the Second Circuit from that part of the judgment granting the defendants' motion for directed verdict on the issue of punitive damages which was entered in this action on December 13, 1973.

Dated: January 25, 1974

Respectfully submitted,

PAUL MARTIN WOLFF
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